CITATION: Liang v. SSR Mining, Inc., 2024 ONSC 4432
COURT FILE NO.: CV-24-00716034-00CP
CV-24-00719454-00CP
DATE: 20240809

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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CHAO LIANG, Plaintiff

– and –

SSR MINING, INC., RODNEY P. ANTEL, and ALISON WHITE, Defendants

AND RE: MICHAEL JONES, Plaintiff

– and –

SSR MINING, INC. and RODNEY P. ANTEL, Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Jay Strosberg*, for the Plaintiff, Chao Liang

Andrew Morganti and Vincent DeMarco, for the Plaintiff, Michael Jones

Akiva Stern, for the Defendants

HEARD: August 8, 2024

CARRIAGE MOTION

I. The carriage contest

[1] These proposed securities class actions have been commenced by two experienced class action law firms: Strosberg Sasso Sutts LLP ("SSS") and Berger Montague (Canada) PC ("BMC"). They are engaged in a carriage dispute which is to be decided pursuant to Section 13.1(2) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*").

[2] The statutory criteria for making a carriage decision are set out in section 13.1(4) of the *CPA*, which provides:

> On a carriage motion, the court shall determine which proceeding would best advance the claims of the class members in an efficient and cost-effective manner, and shall, for the purpose, consider,
>
> (a) each representative plaintiff's theory of its case, including the amount of work performed to date to develop and support the theory;
>
> (b) the relative likelihood of success in each proceeding, both on the motion for certification and as a class proceeding;
>
> (c) the expertise and experience of, and results previously achieved by, each solicitor in class proceedings litigation or in the substantive areas of law at issue; and
>
> (d) the funding of each proceeding, including the resources of the solicitor and any applicable third-party funding agreements as defined in section 33.1, and the sufficiency of such funding in the circumstances.

[3] At this stage the merits are not being adjudicated: *Blackford-Hall v. Simply Group*, 2021 ONSC 8502, at para. 4. Nevertheless, keeping the above four criteria in mind, I must ask whether, from the investors' point of view and, of course, from the court's point of view, the *Liang* action commenced by SSS (Court File No. CV-24-00716034-00CP), or the *Jones* action commenced by BMC (Court File No. CV-24-00719454-00CP), will provide the more efficient process for the optimal results.

II. The competing actions

[4] Subsections 13.1(4)(a) and (b) of the *CPA* ask about the quality, prospects, and progress of the respective actions. Subsections 13.1(4)(c) and (d) ask about the expertise and experience of the lawyers involved and the financing of the respective actions. I will address these in reverse order, starting with subsection (d) and working my way up to (a).

i) Funding

[5] The two competing law firms present different funding models for their respective actions. Both approaches have worked well for these firms in the past and I am confident they will continue to do so now.

[6] SSS has produced a third-party funding agreement. There has not yet been a funding approval motion, which makes me reluctant to comment in too detailed a fashion on the merits of

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this proposed agreement. That said, it generally appears to follow the pattern of other funding agreements that the court has approved in the past.

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[7] In brief, the funder for the *Liang* case commits to covering the expenses of the action and to indemnifying the representative plaintiff in the event of any adverse costs awards, in return for which the funder earns some compensation in the event of a successful settlement or result at trial. I have good reason to believe that this is a workable and effective funding arrangement.

[8] BMC has deposed that it does not require third-party funding. As the firm has done with other class actions in the past, it will self-fund this action. Counsel for BMC points out that his firm has a successful track record in funding its own clients and their cases, and has never been found to be delinquent in the payment of costs or other matters relating to its Ontario class actions.

[9] Counsel also points out that the supporting affidavit describes BMC as being affiliated with a large and well-established U.S.-based class action firm, which adds considerable financial depth. SSS complains that BMC has not made any detailed financial disclosure about its own finances or the financial position of its U.S. affiliate, and so has not proved that it has the financial wherewithal to handle this litigation. With respect, I do not think that the purpose of section 13.1(4)(d) is to put law firms to the uncomfortable task of making their own financial disclosure to competitors where there is no reason to believe that the firm is too financially weak to handle a class action file. Law firms do not have to expose their finances to scrutiny where there is no carriage contest, and there is no good reason to make them do so in a carriage motion unless there is reason to believe that their financial situation is not up to the task.

[10] A partner at BMC has deposed that the firm is in a financial position to properly fund the *Jones* action. There is every reason to believe that what has worked well for BMC in the past – holding the plaintiff and class harmless while saving them the expense of a third-party funder – will continue to work effectively for them in the present case. The very fact that BMC and its predecessor firms have been able to work this way on a consistent basis over the years speaks to their financial depth. Under the circumstances, making them expose their internal finances in the way suggested by SSS will be an unnecessary and unfair burden.

[11] In short, both law firms and actions pass the hurdle imposed by section 13.1(4)(d) of the *CPA*. I find they are both likely to be capable of handling the financial burden of the case, and neither presents a more desirable method of financing the litigation than the other.

ii) The lawyers

[12] Although counsel from SSS and BMC have put considerable effort into distinguishing their respective experiences and accomplishments from each other, they are rather similar. In fact, a founding principal of BMC was himself once a partner of SSS. The truth is that, all else being equal in the two actions, I would be happy to choose either firm to take carriage of any securities class action.

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[13] SSS and BMC, and the individual lawyers staffing these cases, have represented investors in many of Ontario's and Canada's leading securities class actions. I need not delve into their detailed backgrounds as set out in both firms' factums to know that they are each equally qualified and highly competent in this field. They both have lawyers on the record and otherwise within their respective firms who are securities litigation experts and whose knowledge brings a depth of experience and understanding that can only be found in a handful of Ontario law firms. Either firm can be counted on to invest the resources necessary to pursue a securities misrepresentation case like this one, and to represent a class of claimants with great legal acumen and professional skill.

[14] The question for this carriage motion, therefore, is not so much 'which firm?', but 'which case?' Section 13.1(4) of the *CPA* requires the court to ask which of the actions will most effectively and efficiently advance the claims. Focusing on the quality of lawyering and depth of two competing firms will yield little that is helpful in that regard. Their respective expertise and resources ae roughly equal.

iii) Likelihood of success

[15] The *Liang* and *Jones* actions both arise from the February 13, 2024, landslide at the Çöpler Mine owned by the Defendant, SSR Mining, Inc. ("SSR") in Erzincan, Turkey. That event resulted in the death of nine people and the injury of many more. It also caused substantial environmental destruction to the land in its vicinity.

[16] The claims allege that SSR made material misrepresentations in core and non-core documents with respect to its safety mechanisms and management of the mine, and that had the material facts been accurately reported the accident would have been avoided or would have been less disastrous. They go on to allege that accurate reporting would have highlighted SSR's increased risk of loss, and thus would have caused SSR's securities to trade at a substantially lower price before the start of the class period.

[17] At the hearing of this motion, counsel in *Liang* characterized the secondary market misrepresentation claims under Part XXIII.1 of the Ontario *Securities Act* ("*OSA*") as the "main event". The other claims under common law or provincial corporate statutes are preliminary bouts or side shows. I would agree with that general assessment. In order to be truly successful, both actions will have to pass the hurdle not only of a certification motion under section 5(1) of the *CPA*, but of leave to proceed under section 138.8 of the *OSA*. Those motions will be nearly identical in *Liang* and in *Jones*.

[18] What differs, to put it bluntly, are the minor sideshows. For the non-*OSA* claims, each side picks away with complaints about how the other has fashioned their pleading. Counsel in *Liang* contends that the *Jones* pleading raises the British Columbia oppression remedy that is not justiciable in Ontario; counsel in *Jones* contends that the *Liang* pleading names as Defendant a superfluous SSR officer that adds expense but no extra recovery to the claim. Counsel in *Liang*

argues that the *Jones* claim includes NASDAQ purchasers already covered in a parallel U.S. class action; counsel in *Jones* argues that the *Liang* claim omits NASDAQ purchasers whose claim might be dismissed under more stringent U.S. class action criteria.

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[19] The list of complaints goes on. Counsel in *Liang* observes that the *Jones* pleading fails to define a start date for the common law misrepresentation claim, and omits the reliance issue for SSR share purchasers; counsel in *Jones* observes that the *Liang* pleading has a too early start date for the common law misrepresentation claim, and omits the basis for a 'holders claim' by those induced not to sell their shares. Counsel in *Liang* submits that the common law claims must be a mirror image of the statutory misrepresentation claims; counsel in *Jones* submits that the very point of raising two different causes of action is to attract liability in two different rather than in two identical ways.

[20] With the greatest of respect to all counsel, as well as to Bogart, it doesn't take much to see that the problems of these little doctrines don't amount to a hill of beans in this class action world. The real action, both sets of counsel and claimants acknowledge, is in the *OSA*-based claims. And in advancing those claims, there is little difference between *Liang* and *Jones*.

[21] To be clear, if leave to appeal and certification are granted with respect to those statutory claims, the difference in the subsidiary issues will be all but irrelevant. And if leave to appeal and certification are denied with respect to the statutory claims, the minor differences and criticisms will be a drop in the bucket compared to the deluge of challenges that the plaintiffs in both cases will face in sustaining their actions.

[22] In short, there are some differences in the legal approach of the two claims and in the way the two pleadings are structured. But those differences are not sufficient to distinguish one claim as significantly more promising than the other.

iv) Stage of development

[23] One thing clearly distinguishes the two claims. SSS started the *Liang* action first, on March 6, 2024; BMC started the *Jones* action several months later, on May 1, 2024. This would likely be a definitive difference under Quebec's 'first-to-file' rule: *Wainberg v. Zimmer Inc.*, 2012 QCCS 4276, at para. 35. But it is not conclusive in Ontario. Other factors must be weighed against the speed with which a plaintiff and plaintiff's counsel shot out of the starting gate.

[24] What the head start by the SSS team does signify, however, is that the *Liang* action is more well developed at this point than the *Jones* action. What counts is not the early filing of the *Liang* action, but the early investment of resources by the SSS firm in getting that claim off the ground.

[25] Thus, for example, both law firms have retained Turkish law experts, but the record before me establishes that only SSS's Turkish expert has obtained original source documents from the Turkish authorities and has started work on putting together the evidentiary basis for the claim.

The BMC Turkish law experts appear to have just been retained and there is as yet no work product described in the record.

[26] Similarly, SSS has retained and started working with a mining engineer experienced with the type of leach pads at issue in SSR's mine accident. BMC has indicated that it is still interviewing and seeking a mining expert with the requisite knowledge and experience. Likewise, SSS has a website devoted to the *Liang* action that keeps potential class members up to date and informed about all developments relevant to the claim. BMC has indicated that it is about to instruct its IT consultant to start working on a website for the *Jones* action.

[27] It is, of course, still early days for both actions. Based on experience with the two law firms, I have little doubt that in the fulness of time each of them and each of the actions will be well developed and well prepared for a certification motion. But as matters stand today – the only vantage point from which I can view the issues in this motion – the SSS firm and the *Liang* action are out front. To put matters simply, SSS has invested more and gone farther with its case than has BMC.

[28] Accordingly, of the four criteria which the *CPA* directs me to consider, it is the factor described in section 131.1(4)(a) that is the only definitive distinction between the two competing cases. SSS and the *Liang* action are the clear favorites over BMC and the *Jones* action when it comes to "the amount of work performed to date to develop and support the theory [of the case]."

[29] In the absence of any other distinction with a real and substantial difference, this criterion tips the balance in favour of SSS/*Liang*.

III. Disposition

[30] Carriage of this proposed class action is granted to the *Liang* action with SSS as Plaintiff's counsel.

[31] The *Jones* action is stayed.

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Date: August 9, 2024 **Morgan J.**

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