IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Charlton v. Musashi Bockenau GmbH & Co. KG,* 2024 BCSC 1911

Date: 20240906
Docket: S211884
Registry: Vancouver

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Between:

Kevin Charlton

Plaintiff

And

Musashi Bockenau GmbH & Co. KG, Hirschvogel Umformtechnik GmbH, Bharat Forge CDP GmbH and Bharat Forge Global Holding GmbH

Defendants

Before: The Honourable Justice Veenstra

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	S.J. Jaworski S. Turner C. Shanks, Articled Student
Counsel for the Defendant, Musashi Bockenau GmbH & Co. KG:	J.M. Young N. Campbell J. Chad
Counsel for the Defendant, Hirschvogel Umformtechnik GmbH:	R.L. Reinertson
Counsel for the Defendants, Bharat Forge CDP GmbH and Bharat Forge Global Holding GmbH:	E. Grant

Place and Date of Hearing:	Vancouver, B.C. September 6, 2024
Place and Date of Judgment:	Vancouver, B.C. September 6, 2024

[1] **THE COURT:** This is a proceeding brought under the *Class Proceedings Act* [*CPA*]. On February 1, 2024, I gave an order for consent certification of this proceeding for the purposes of settlement with the first named defendant, Musashi Bockenau GmbH & Co. KG (the "Settling Defendant"). I also approved a notice plan to provide notice to class members. I note that the certification order I made was without prejudice to the rights and defences of the non-settling defendants.

[2] In the present application, the plaintiff seeks an order approving the settlement with the Settling Defendant. By way of background, the pleadings allege that the defendants engaged in anti-competitive conduct in their operation as competitors in the worldwide market for forged steel products. It pleads a breach of the *Competition Act*, R.S.C. 1985, c. C-34. The defendants are all German corporations that manufactured, marketed, sold, or distributed forged steel products which include forged steel and steel alloys in various states of manufacture that are manufactured for use as parts in motor vehicles.

[3] This action was commenced in February 2021 and the defendants were served with the notice of civil claim in July 2021. After a judicial management conference in February 2022, the defendants all filed responses to civil claim and jurisdictional responses in May 2022. I am told this is the only proceeding in Canada dealing with the subject claims.

[4] Settlement negotiations subsequently ensued between lawyers for the class plaintiff and lawyers for the Settling Defendant, leading to a settlement agreement made on October 4, 2023, which agreement was subject to approval in this proceeding. Steps taken to implement the notice plan that was approved in my order of February 1, 2024, include:

a) publication of information on class counsel's website, in both English and French, to which other electronic media publications were linked;

b) emailing notice to the six individuals who had previously contacted class counsel;

c) a press release issued in both English and French distributed across Canada Newswire;

d) distribution of the notice by way of targeted and untargeted social media campaigns on the Facebook and Google Ads platforms;

e) publication on two Canadian car-based public discussion forums; and

f) distribution of notice to numerous consumer and industry associations for voluntary distribution to their respective members.

[5] Class counsel received no inquiries from potential class members about the settlement nor any objections or opt-outs.

[6] At the hearing before me, both the plaintiff and the Settling Defendant supported the application, while the non-settling defendants took no position. There was no opposition to the application.

[7] At the risk of oversimplifying its detailed provisions, I would summarize the proposed settlement agreement as including the following key terms:

a) payment of an all-inclusive amount of $595,000 Canadian;

b) a detailed series of releases and covenants not to sue, with no admission of liability; and

c) meaningful cooperation with class counsel, including an evidentiary proffer and disclosure of certain documents.

[8] At the present time, there is no plan for distribution of the settlement amount that is being paid, given that the plaintiff contemplates ongoing proceedings against the remaining defendants.

[9] The settlement agreement requires that the settlement funds be deposited into an interest-bearing trust account, with the interest accruing to the class until such time as a distribution plan is approved. The one exception to this is that class

counsel may seek court approval to pay either disbursements or fees, but that would be the subject of a future application.

[10] The applicable legal principles were summarized by Justice Kent in *McLean v. Cathay Pacific Airways Limited*, 2021 BCSC 1456, at paras. 25-29:

> [25] Under the *Class Proceedings Act,* s 35, "[a] class proceeding may be settled only with the approval of a judge" and, once approved, binds every class member "who has not opted out of or been excluded from the class proceeding".
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> [26] The Class Proceeding Act does not set out the test for settlement approval. However, the jurisprudence is that the court looks to whether the settlement is "fair and reasonable and in the best interests of the class as a whole". A class action settlement is not required to be perfect; rather, the settlement must "fall within a range or zone of reasonableness to be approved": C*ardozo v. Becton, Dickinson and Company*, 2005 BCSC 1612 at para. 16; *Bodnar v. The Cash Store Inc.*, 2010 BCSC 145 at para. 17.
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> [27] Public policy favors the settlement of complex disputes. There is a strong presumption of fairness where a settlement has been negotiated at arm's length. Experienced Class Counsel is in a unique position to assess the risks and rewards of the litigation and her/his recommendation is given considerable weight by the reviewing Court: J*ones v. Zimmer GMBH*, 2016 BCSC 1847 at para. 36
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> [28] The Court cannot modify the terms of a negotiated settlement. All it can do is approve or reject the settlement: *Jones v. Zimmer GMBH*, 2016 BCSC 1847 at para. 37.
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> [29] Canadian courts have identified 10 factors to consider when assessing the reasonableness of a settlement:
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> a. the likelihood of recovery, or the likelihood of success;
> b. the amount and nature of discovery evidence;
> c. settlement terms and conditions;
> d. recommendations and experience of counsel;
> e. future expense and likely duration of litigation;
> f. recommendations of neutral parties, if any;
> g. number of objectors and nature of objections;
> h. presence of good faith and absence of collusion;
> i. degree and nature of communications by counsel and the representative plaintiffs with class members during litigation;
> j. information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.
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> *Cardozo v. Becton, Dickinson and Company*, 2005 BCSC 1612 at para. 17; *Jones v. Zimmer GMBH*, 2016 BCSC 1847 at para. 42

[11] The plaintiff emphasized that the proposed settlement was negotiated at arm's length by experienced counsel on behalf of the class members. Those negotiations began in June 2022 and led to the October 2023 settlement agreement. The settlement negotiations included sharing of confidential production information by the Settling Defendant, analysis of that information by an expert competition economist retained by the plaintiff, and the exchange of informed offers and counteroffers with discussion of the various variables and other factors that might be considered in the valuation of a claim for damages.

[12] Class counsel attaches importance to the cooperation provisions of the settlement agreement for which valuable consideration is reflected in the financial amount payable.

[13] Class counsel views this as an ice-breaker settlement which has significant strategic value in mitigating some of the litigation risk by potentially providing financing for the litigation and improving the likelihood of success at certification and in a trial on the merits. As noted in *Di Filippo and Caron v. Bank of Nova Scotia et al*, 2019 ONSC 3282, at para. 17:

> [17] The settlement agreements herein are the first settlements in the gold and silver price-fixing actions. Such settlements are commonly referred to as "ice breaker" settlements. In a "ice breaker" settlement and in particular, in class proceedings alleging secret price fixing conspiracies, this court has held that the first settling defendant's agreement to cooperate with class counsel is one of the most significant and valuable features of the settlement. This is because the settlement will: (A) assist in advancing the claims against the non-settling defendants; and (b) encourage settlements with those other defendants. [3] Indeed, this court has noted that the non-monetary benefit of having one alleged conspirator cooperate with the plaintiffs is of "inestimable value" in price-fixing litigation.

[14] With respect to the likelihood of success and recovery, the evidence before me indicates that in February 2021 the German competition authority (the Bundeskartellamt) announced that it had imposed fines totaling 35 million Euros on three of the defendants, including the Settling Defendant, in connection with antitrust infringements. While that certainly suggests some strength to the underlying liability claims, I accept that there is litigation risk in certifying any class action, as well as in

proving those claims in Canada, given that the defendants are German companies, and in establishing damages suffered by Canadian class members.

[15] I have not been provided with the detailed financial data and economic analysis that were obtained by class counsel. However, I am satisfied on the evidence before me that the class is represented by experienced counsel who have acted in good faith and in the best interests of the class.

[16] It is noteworthy that while there were significant efforts made to distribute notice to class members, no objection has been taken to the proposed settlement.

[17] In all of the circumstances, I accept that the proposed settlement is fair, reasonable and in the best interests of the settlement class, and I approve it pursuant to s. 35 of the *CPA*.

[18] As requested, and having canvassed this with counsel, I would also dispense with signatures on the formal order of anyone other than the plaintiff and the first named defendant, Musashi Bockenau. The other parties here today do not need to sign it.

"Veenstra J."