CITATION: Allott v. AVX Corporation, 2018 ONSC 7352
COURT FILE NO.: 1272/16CP
DATE: 20181207

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Sean Allott (Plaintiff)	Jonathan Foreman and Jean-Marc Metrailler, for the Plaintiff
– and –	
AVX Corporation; Elna Co., Ltd.; Elna America Inc.; Hitachi Chemical Co., Ltd.; Hitachi Chemical Company America, Ltd.; Hitachi Canada; Hitachi AIC Inc.; Kemet Corporation; Kemet Electronics Corporation; Matsuo Electric Co., Ltd.; Nichicon Corporation; Nichicon (America) Corporation; Nippon Chemi-Con Corporation; United Chemi-Con Corporation; Nissei Electric Co. Ltd.; Nitsuko Electronics Corporation; Okaya Electric Industries Co., Ltd.; Okaya Electric America, Inc.; Panasonic Corporation; Panasonic Corporation of North America; Panasonic Canada Inc.; ROHM Co., Ltd.; ROHM Semiconductor U.S.A., LLC f/k/a ROHM Electronics U.S.A., LLC; Rubycon Corporation; Rubycon America Inc.; Shinyei Kaisha; Shinyei Technology Co., Ltd.;Shinyei Capacitor Co., Ltd.; Shizuki Electric Co., Ltd.; American Shizuki Corporation; Soshin Electric Co., Ltd.; Soshin Electronics of America Inc.; Taitsu Corporation;Taitsu America, Inc.; Toshin Kogyo Co., Ltd.; Holy Stone Enterprise Co., Ltd.; Milestone Global Technology, Inc. d/b/a Holystone International; and Vishay Polytech Co., Ltd. f/k/a Holysone Polytech Co., Ltd. (Defendants)	See Schedule "A", for the Defendants

HEARD: November 5, 2018

RAIKES J.

[1] The plaintiffs move for an order approving two settlements pursuant to s. 29 of the *Class Proceeding Act, 1992*, S.O. 1992, c. 6 ("*CPA*").

[2] The first settlement is with the defendants, Okaya Electric Industries Co., Ltd. and Okaya Electric America, Inc. (hereafter "the Okaya defendants"). The settlement agreement is dated December 15, 2017.

[3] The second settlement is with the defendant, Nitsuko Electronics Corporation (hereafter "Nitsuko"). The settlement agreement is also dated December 15, 2017.

[4] This action is one of three parallel class proceedings in Ontario, Québec and British Columbia. Between them, all of the jurisdictions in Canada are covered. The Québec and British Columbia actions assert claims on behalf of residents of those provinces. The Ontario action is a national class excepting those in Québec and British Columbia.

[5] The settlement agreements purport to settle all three actions and are conditional on court approval in each of the three jurisdictions.

Nature of Claim

[6] This is a price fixing action. The plaintiff alleges that the defendants participated in an unlawful conspiracy to fix, maintain, increase or control the price for the supply of film capacitors ("Film Capacitors"), and/or to enhance unreasonably the price of Film Capacitors, and/or to lessen unduly competition in the sale of Film Capacitors in Canada.

[7] The Okaya and Nitsuko defendants are among the alleged co-conspirators. The Okaya defendants are companies based in Japan and Indiana, USA. Nitsuko is a company based in Japan.

[8] This action was commenced by statement of claim issued May 13, 2016.

Certified for Settlement Purposes

[9] On June 28, 2018, I certified this action as a class proceeding for settlement purposes as against the settling defendants only. On that date, I also approved publication of the notices of certification and of the settlement approval hearing together with the plan of dissemination. In July 2018, the courts in Québec and British Columbia did the same.

[10] RicePoint Administration Inc. was approved and designated to receive opt-out notices from members of the class. RicePoint received three opt-out forms from three companies, two of which appear to be related.

[11] Although notice of the settlement approval hearing was provided, no one attended to object to the proposed settlements.

Law – Settlement Approval

[12] Settlement of a class proceeding requires court approval: s. 29 *CPA.* Once approved, the settlement binds all class members: s. 29(3) *CPA.*

[13] On a motion for court approval of a settlement of a class proceeding, the applicable test is whether, in all the circumstances, the settlement is fair, reasonable and in the best interests of those affected by it. The following principles apply to the consideration of a proposed settlement:

- the resolution of complex litigation through compromise of claims is encouraged by the courts and is consistent with public policy
- a settlement negotiated at arms' length by experienced counsel is presumptively fair
- to reject the terms of the settlement and require that litigation continue, a court must conclude that the settlement does not fall within a range of reasonable outcomes
- a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. The court must recognize that there are a number of possible outcomes within a range of reasonableness
- it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement
- it is also not the court's function to litigate the merits of the action or simply rubber stamp a settlement.

(See *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. C.J. (Gen. Div.)) at para.9; *Nunes v. Air Transat AT Inc.* (2005), 20 C.P.C. (6th) 93 (Ont. S.C.) at para. 7; *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643 at para. 31.)

[14] There are several factors which the courts have considered to assess the reasonableness of a proposed settlement. These factors include:

- the likelihood of recovery or likelihood of success, sometimes referred to as litigation risk
- the amount and nature of discovery, evidence or investigation
- the proposed settlement terms and conditions

- the recommendation and experience of counsel
- the likely duration of the litigation
- the number of objectors and the nature of the objections
- the presence of arms' length bargaining and the absence of collusion
- the positions taken by the parties in the litigation and during negotiations.

(See *Marcantonio v. TVI Pacific Inc.* (2009), 82 C.P.C. (6th) 305 at para. 12; *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 at paras. 71 – 73.

[15] The court must be satisfied that there is both substantive and procedural fairness. Procedural fairness deals with the manner in which the settlement has been reached. It requires a consideration of the process followed. Hard-fought arms' length negotiations go a long way to satisfy the requirement of procedural fairness.

[16] The burden of satisfying the court that a settlement should be approved is on the party seeking approval: *Nunes*, para. 7 citing *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118 (S.C.J.).

Settlement Terms

[17] The two settlement agreements were negotiated independent of one another but contain many of the same clauses and provide similar benefits. I will address the terms of each agreement separately.

a. Okaya Settlement Agreement

[18] Pursuant to the Okaya settlement agreement, the Okaya defendants are required to

- Pay CDN $460,000 to plaintiff's class counsel for deposit to a trust account for the benefit of class members.
- Provide an oral evidentiary proffer through a meeting of counsel before the settlement approval hearings which will set out the Okaya defendants' relevant and non-privileged information derived from their investigation and factual inquiries of the matters at issue in the Canadian litigation. This includes information from business records, testimonial transcripts and employee or witness interviews concerning their knowledge of how the alleged conspiracy was formed, implemented and enforced.
- Within 30 days after the courts have approved the settlement, the Okaya defendants will provide,

- copies of ordinary course of business documents produced by the Okaya defendants to the United States Department of Justice together with any translations of those documents provided to the Department of Justice

- copies of all ordinary course of business documents produced to any other foreign regulator with English translations to the extent such documents are not already disclosed to the U.S. Department of Justice

- sales data of Film Capacitors by customer and by date

- all non-privileged documents produced through discovery in the U.S. class action litigation

- information regarding major customers during the class period, specifically including OEMs who manufacture finish products

- a list of top customers broken out by OEMs and distributors along with information in Okaya's possession that shows what types of products the customers make that incorporate Okaya's capacitors and where such products are re-sold, if known.

- Make available up to two employees with relevant knowledge for personal interviews by class counsel and/or experts retained by class counsel.

- Make available one employee to testify at the certification motion and at trial to support the submission into evidence of any information provided pursuant to the settlement agreement and to authenticate and provide foundation for the documents to be used in connection with prosecution of the case against the remaining defendants.

[19] In return, the Okaya defendants get a full and final release that is comprehensive, an order dismissing the action as against them and protection against the prospect of being dragged back into the action by claims for contribution or indemnity by other defendants through a bar order. In short, the Okaya defendants are then free of the risk of the litigation and much of the cost associated with that litigation.

b. Nitsuko Settlement Agreement

[20] Pursuant to the Nitsuko settlement agreement, Nitsuko will

- Pay the sum of US $$190,000 to class counsel for deposit into a trust account for the benefit of class members

- Provide cooperation by

- an oral proffer by counsel for Nitsuko of the facts known to them about the conspiracy alleged including meetings or communications between competitors in the capacitors industry

- providing documents to class counsel as follows:

    - copies of documents concerning JFC meetings attended by Nitsuko including meeting minutes and notes from attendees and emails related to JFC meetings

    - copies of documents produced by Nitsuko to Canadian, U.S. and foreign law enforcement authorities concerning capacitors including English translations to the extent they exist

    - Canadian transactional sales data of sales by Nitsuko of Film Capacitors in Canada during the class period to the extent such sales data exists

    - electronic copies of non-privileged documents produced by Nitsuko through discovery in U.S. proceedings

    - the names of Nitsuko's 10 largest customers of Film Capacitors world-wide during the class period to the extent the data exists to make this determination. Nitsuko is to make best efforts to identify which of those customers are OEMs or distributors if such information is within their knowledge

    - reasonable assistance in tracing finished products that contain Film Capacitors to Canada by making reasonable best efforts to provide information regarding the location of products containing Nitsuko's Film Capacitors during the class period to the extent such information is within its knowledge and is not unduly onerous or time-consuming.

- Nitsuko will make best efforts to make available up to two current or former employees with relevant knowledge for an interview with class counsel and/or experts retained by class counsel. Those interviews shall not exceed six hours per employee.

- Nitsuko will make reasonable efforts to provide or obtain affidavits for use in the proceeding to support the submission into evidence of any documents or information provided by the settling defendant. If the court determines that the affidavits are inadequate for that purpose, Nitsuko agrees to use reasonable efforts to make available for oral testimony an appropriate representative.

[21] The benefits to Nitsuko are the same as those obtained by the Okaya defendants above.

[22] I note that with respect to the Nitsuko settlement,

- the amount being paid is more modest than that being paid by the Okaya defendants even with allowance for exchange from US dollars
- there is no pre-settlement disclosure – no peek behind the curtain
- after settlement, the proffer is oral and only by counsel for Nitsuko
- many of the documentary disclosure obligations are couched in language that is far from certain of execution.

Evidence of Reasonableness

[23] In support of the motion, plaintiff's counsel has provided an affidavit sworn by an associate of his firm in which she advises that class counsel and the plaintiff regard the monetary recoveries to be fair and reasonable because:

1. The payments are "ice breaker" settlements by defendants who have relatively small market shares.
2. From class counsel's review of the Film Capacitors market during the relevant time, Okaya and Nitsuko had "trace" global market shares with Okaya being the larger of the two settling defendants.
3. The Film Capacitors market was comprised of two main segments: AC Film Capacitors comprising approximately 57% of the overall Film Capacitor market and DC Film Capacitors comprising the remaining 43% of that market. Class counsel's research indicates that neither Okaya nor Nitsuko had any reported market share in the AC Film Capacitor segment. In the DC Film Capacitor segment, there is evidence that Okaya at certain points reached a 4% market share whereas Nitsuko had no reported market share of the DC Film Capacitor segment.
4. Both Okaya and Nitsuko have disclosed their direct Film Capacitor sales to Canadian customers during the class period. The estimated value of such sales is approximately $37,500 for Okaya and $0 for Nitsuko.
5. The monetary recoveries cannot be viewed in isolation from the additional value provided by these defendants through cooperation commitments.

[24] In oral submissions, Mr. Foreman confirmed that the advance proffer under the Okaya settlement occurred. He was not at liberty to disclose the content of same but, suffice to say, he indicated that he was satisfied that there was valuable and helpful information to be gained.

Analysis

[25] Each of the two settlement agreements were negotiated through experienced counsel without use of a mediator. Those negotiations took place over a lengthy period of time. The Okaya discussions continued for more than a year while the Nitsuko negotiations lasted approximately 10 months. The negotiations were at arm's length.

[26] I see no reason to question the procedural fairness of the settlements achieved. Although the amounts being paid are very modest, there is nothing to indicate that class counsel have sacrificed the interests of the class for their own benefit; to the contrary, the focus of these settlements appears to lie in bettering the plaintiff's chances of success and recovery against of the remaining defendants who are, by all accounts, much bigger players in the Film Capacitor global market.

[27] There is no question that this litigation is fraught with risk. Quite apart from whether the action will be certified, the plaintiff has taken on an industry or at least its principal players. The defendants are large corporations who are well resourced. They have engaged very capable counsel and to this point show every intent to vigorously defend this litigation. Success is far from assured.

[28] The amounts being paid by these defendants are small. They are almost nuisance sized in a class action context. However, the evidence indicates that direct sales by these defendants in Canada during the claim period were minimal or, in the case of Nitsuko, non-existent. The amounts being paid are orders of magnitude greater than those direct sales.

[29] I note that very little evidence, if any, was provided as to the value of indirect sales in Canada. The settling defendants' principal customers are companies in Asia that manufacture electronic products containing Film Capacitors. The extent to which those products are sold in Canada is unknown. However, some comfort may be taken in the fact that these defendants appear to be relatively minor players in the Film Capacitor global market. If so, it seems unlikely that their indirect purchaser footprint will be significant.

[30] The value in this settlement lies principally in the disclosure and cooperation to be provided by these defendants. Class counsel has already had limited advance disclosure from the Okaya defendants. His assurance to the court that he is pleased by what he saw is not evidence but, as an officer of the court, he responded cautiously but directly to my inquiry.

[31] The disclosure and cooperation agreed to in the Nitsuko settlement agreement seems to me slightly less fulsome and its value to the plaintiff is less established given the lack of any advance proffer. Nevertheless, both settlement agreements alone and in combination offer the prospect of evidence beneficial to the plaintiff's case against the remaining defendants. It comes at an early stage procedurally. Experienced counsel in price-fixing class actions urges upon me the acceptance of these agreements because, in part, his past

experience in similar matters leads him to believe that this information and cooperation will have long-term benefits for the class that cannot be fully measured at this stage.

[32] I am satisfied that the settlement agreements are fair, reasonable and in the best interests of the class. I approve the Okaya and Nitsuko settlement agreements conditional on settlement approval by the courts in Quebec and British Columbia.

[33] Counsel provided a draft order to me during submissions. I have reviewed it and am satisfied with same. I am content to sign that order with necessary modification to the date. I ask that counsel advise whether that is satisfactory or whether they prefer a clean copy with the correct date be signed. If the latter, it should be sent to me electronically.

Raikes, J.

Released: December 7, 2018

Schedule "A"

Counsel, for AVX Corporation – Eric Dufour, Pascale Cloutier and Brian Whitwham

Counsel, for the Elna Defendants – David T. Neave, Kevin Wright and Todd Shikaze

Counsel, for the Hitachi Defendants – Katherine Kay, Eliot Kolers and Mark Walli

Counsel, for the KEMET Defendants – Davit Akman and Denes Rothschild

Counsel, for the Matsuo Defendant – Adam Goodman

Counsel, for the Nichicon Defendants – Dr. Neil Campbell, Jon Wypych, Joan Young and Sidney Elbaz

Counsel, for the Nippon and United Defendants – Gordon Capern and Michael Fenrick

Counsel, for the Panasonic Defendants – Emrys Davis, Jon Rook and Melanie Aitken

Counsel, for the ROHM Defendants - Paul Martin and Vera Toppings

Counsel, for the Rubycon Defendants - W. Michael G. Osborne and Derek Ronde

Counsel, for the Shinyei Defendants - Mark Evans and Sandy Walker

Counsel, for the Shizuki Defendants – Nicholas Hooge, Robert Anderson and Ludmila Herbst

Counsel, for the Soshin Defendants – Robert Kwinter and Litsa Kriaris

Counsel, for the Milestone and Holy Stone Defendants – Donald Huston, Peter Leigh and Gillian Kerr

Counsel, for the Okaya Defendants – David Gadsden and John J. Pirie

Counsel, for Nitsuko - Sandra Forbes