Court of Queen's Bench of Alberta

Citation: Singh v Glaxosmithkline Inc., 2020 ABQB 316

Date:
Docket: 1201 12838
Registry: Calgary

Between:

Fiona Singh and Muzaffar Hussain by His Litigation Representative Fiona Singh

Plaintiffs

- and -

Glaxosmithkline Inc., Glaxosmithkline Llc and Glaxosmithkline Plc

Defendants

Memorandum of Reasons for Decision on Proposed Representative Plaintiff filing Notice of Change of Counsel and of Previous Counsel's Application to Substitute a New Proposed Representative Plaintiff
of the
Associate Chief Justice
J.D. Rooke

Introduction

[1] At the proverbial "end of the day", this Memorandum of Reasons for Decision (Reasons) are about the right of a proposed representative plaintiff (prp – generic herein, or when not in reference to the specific PRP, who is the Plaintiff herein) in a class proceeding to change counsel. However, in this strange case (see Background *infra*), there are, to continue the metaphor, a lot of days leading up to these Reasons, and some to follow.

[2] In the end, for the reasons that follow, I acknowledge, and, in face of challenge by Merchant Law, approve, the Proposed Representative Plaintiff, Ms. Singh's (Singh or PRP), right to change counsel and to file a Notice of Change of Representation to Counsel associated with a consortium of Guardian Law and KoT Law (the Consortium) so as to continue the carriage of this action.

[3] Additionally, I deny the application of her former Counsel, Merchant Law, and New Proposed Representative Plaintiff, Ms. Auch (Auch or NPRP), to substitute the NPRP for the current PRP (Substitution Application), filed May 15, 2019.

[4] Mr. Merchant, on January 18, 2021, also filed, in the alternative to his Substitution Application, an Application for a Charging Order (Charging Application) against the PRP in respect of fees and disbursements incurred to date, in the event that he was not successful, as is now the case, on the Substitution Application. I will make no decision on the Charging Application at this time, so as to see if the PRP and Merchant Law can resolve same now that it is known who has continued carriage of the action, although the Order to grant the PRP continued carriage of the action with New Counsel will be conditional on and subject to an agreement between the PRP and Merchant Law, or a future decision as to the substance of the Charging Application.

[5] These Reasons are brief and not robust, but I issue them now in their current state, so that New Counsel (NC) for the PRP, and Counsel for the Defendants, can determine if they wish to file any supplementary material on certification, and, if so, for me to set a schedule for that before I determine the application for certification. In the result, I reserve the right to issue supplementary reasons for this Decision, if I find it necessary or advisable to do so, up to and including the time that I decide the certification application that is currently before me - and has been for over two years held in abeyance by me, pending the resolution of the dispute herein between the PRP, the NPRP, and old and new counsel for the PRP.

[6] The simple reasons for these decisions are those set out in the case that is substantially on all fours, with the case at Bar, namely ***Fantl v. Transamerica Life Canada***, 2009 ONCA 377 (***Fantl CA***). Many of the passages of that decision, in addition to references therein to the motions judge's decision ([2008] OJ No. 1536 - ***Fantl ONSC***), and the Divisional Court's decisions ([2008] OJ No. 4928 - ***Fantl ONDC***) leading to the Court of Appeal's decision, are worthy of repetition herein, but I will try to limit same, as, indeed, the whole of the Court of Appeal's decision is relevant, *mutatis mutandis*.

[7] To be clear, none of the ***Fantl*** decisions are binding on me. However, as to ***Fantl CA***, I find the conclusion therein, and the reasoning getting there, very persuasive. The decision is written by the highly respected former Chief Justice of Ontario, Winkler CJO, who had to that point much experience and wisdom in relation to civil procedure in general, and class actions in particular. In the result, I find it a proper basis on which to anchor my decision herein.

Background

[8] This action started in 2012, and already had a long history when I became case management justice (CMJ) in January 2019, when the existing CMJ recused due to a then recently discovered potential conflict.

[9] Starting at about the time the subject issue herein arose (i.e., when the representation of the PRP by then Counsel, Merchant Law, had begun to unravel), aside from some other substantive certification issues then existent between Counsel for both sides (following from the certification hearings, not now relevant hereto), I had received all of the written and oral submissions necessary for the certification decision in this case by January 8 and 9, 2019, and had my decision as to the certification merits on reserve.

[10] It appears from the subsequent record that Mr. Churko, who appeared with Merchant Law at the certification hearing in January 2019, and who was trusted by Merchant Law with a major part in the work on behalf of the PRP leading to that hearing, in mid January 2019, got into a dispute with Merchant Law and left that firm. It further appears that the PRP wished Mr. Churko to carry on the action, and in the result, on April 19, 2019, the PRP served (but I don't believe filed with the Clerk – it doesn't appear on the Clerk's Record) a Notice of Change of Representation appointing Mr. Churko and his firm, KoT Law, as new counsel of record.

[11] On May 3, 2019, the PRP further filed a formal Notice of Change of Representation to name the Consortium as counsel of record.

[12] There were apparently some initial issues between the PRP and KoT Law in the latter carrying on the action as Counsel for the PRP, relating to the retainer between them, and the ability of KoT Law to carry the action with the need of the PRP to pay (or secure for payment) Merchant Law for fees and disbursements ("work in progress") and costs thrown away claimed by the Defendants against the PRP, such that the PRP had concerns as whether she could carry on the action. Thus, on October 16, 2019, the PRP filed an application seeking to withdraw as PRP.

[13] From November 29, 2019 to March 13, 2020, there are filings, unrelated to the specifics of the applications before me at this time, relating to the Defendant's application for costs against the PRP, in face of her purporting to seek to withdraw.

[14] At this time the Covid-19 pandemic intervened and all applications in the action were suspended as not being emergency applications.

[15] The concerns of the PRP about the ability to carry on with the action seem to have been resolved by February 7, 2020 when the PRP filed and served an affidavit explaining her position over the last year, and appearing to abandon her application to withdraw as PRP, but rather to continue on with the Consortium representing her.

[16] In the interval, on or about May 15, 2019, Merchant Law filed, on behalf of the NPRP, the Substitution Application, supported by the affidavit of the NPRP (sworn April 23, 2019).

[17] These steps led to a conflict between both proposed new Counsel and previous Counsel to the PRP, as well as conflict between the right of the PRP or NPRP to carry on the action.[1]

[18] In the result of this dispute between the competing PRP and the NPRP, and competing law firms, Consortium and Merchant Law, at some point in time I advised all Counsel and parties that I would "set down my pen" on my reserved certification decision until the parties

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[1] However, at the hearing of these conflicting applications Mr. Merchant argued that this was not a "carriage motion", and in correspondence as recently as February 24, 2021 submitted that "The Court is reminded that both sides clearly indicated in oral argument that this is not a carriage fight". The reasons for this position are addressed in para 54 of ***Fantl CA***.

resolved the dispute or brought it before the Court for resolution, which was delayed by the parties not consenting and not taking timely appropriate steps, and the intervening Covid-19 pandemic.

[19] Ultimately, after receiving briefs and related material, and with Court procedures allowing virtual hearings notwithstanding Covid-19, I heard the conflicting position and the Merchant Law applications on February 23, 2021. These Reasons result from that hearing.

Positions of the Parties

[20] I will state the resulting positions of the Parties in simple terms, the details of which are in their briefs and supporting materials, and the transcript of the hearing, but do not need elaboration herein.

[21] The Consortium, in its brief, contrary to the argument of Merchant Law, states that there is no extant application filed by the PRP, but rather that she continues in the position as PRP, and, relying on ***Fantl CA*** at paras 43-4, took the position that she is entitled to change counsel without leave, and thus, there is no status in the NPRP to seek substitution, especially with the Consortium offering to protect all fair and reasonable fees and disbursements of Merchant Law.

[22] The position of Merchant Law and the NPRP, on the other hand is that the PRP needs leave of the Court to withdraw, and that she does not meet the tests set out in ***Fantl CA***.

[23] ***Fantl CA***, at para 47 supports the position of the PRP as to the lack of need of the PRP to seek Court approval to change counsel, except that, in face of challenge of her decision to change counsel, the Court has jurisdiction to review the PRP's decision, in light of the substantive tests set out in ***Fantl CA***, para 49, and should do so, as I will herein.

Analysis and Conclusion

[24] Before I get to the substance of the issue before me, I must make one observation. The Court has jurisdiction under s. 13(2) of the *CPA* to substitute a representative plaintiff with another class member if "a representative plaintiff is not fairly or adequately representing the interests of the class". However, this is not such a case. Indeed, Merchant Law put the PRP forward as a proper and appropriate PRP as recently as January 9, 2019. Her wish thereafter, to change counsel, does not change that.

[25] The tests in ***Fantl CA*** for changing counsel is this situation, and my analysis and conclusions, based on the facts on the record are set out below.

A. Criteria for Choice of Counsel

[26] The test to be applied when a prp's decision to change counsel is contested and the court reviews the prp's choice of counsel is set out in para 49 of Fantl CA:

> Once the court's jurisdiction is engaged, any review by the court of a decision as to choice of counsel must be directed to three factors: (1) Has the plaintiff chosen *competent counsel*? (2) Were there any *improper considerations* underlying the choice made by the plaintiff? (3) Is there *prejudice to the class* as a result of the choice? [Emphasis added.]

1. Competent Counsel – Has the plaintiff chosen competent counsel?

[27] The PRP has changed law firms, but, effectively, not her active counsel. On the basis of her affidavit of February 7, 2021, the PRP asserts under oath that Mr. Churko was, effectively her counsel when he was at Merchant Law, and she wants him to continue.

[28] ***Fantl CA***, at para 60, sets out the tests for competence, which includes: (1) the nature of the lawsuit; (2) the complexity; (3) that it is a class proceeding; (4) the experience of counsel as to the subject matter and class actions; (5) the resources of counsel; (6) the stage of the proceeding; and (7) the basket clause of "any other considerations".

[29] The answers to points (1), (2), (3) and (6) are clearly on the record from the briefs leading to, and the oral submissions at the certification hearings concluded on January 9, 2019, and thus need not be further elaborated herein.

[30] Thus, it is only (4), (5) and (7) that are specifically germane at this time. As to (7), I know of no other considerations.

[31] As to (4) and (5) and the test of competency, in general, I have no evidence that the Consortium is not competent. KoT Law has added Guardian Law to the Consortium team, a firm also active in class proceedings law in Alberta, to provide professional and (I would presume) financial back up to carry the action to conclude certification, and, if granted, to a common issues trial. Thus, in addition to Mr. Churko's experience and worth in the proceedings to January 9, 2019, mentioned *supra*, Guardian Law adds experience and resources to his firm, as part of the Consortium.

[32] More specifically, as to (4), although there were submissions as to the professional experience and strength of the Consortium and Merchant Law, as I noted, Counsel argued that this was not a carriage motion where, in a general sense, in addition to timeliness, the most competent and resourceful are successful in carriage. Indeed, ***Fantl CA*** signaled that such a competition is not appropriate in such a case – see para 53.

[33] Moreover, while competence is the test, being the "best" is not part of the ***Fantl*** test (see paras 6 and 110 of the original motion judge's decision – (***Fantl ONSC***) and para 31 of ***Fantl CA***.

[34] In further elaboration as to factors (4) and (5), I find, on the record, that the Consortium, from both a professional and resource standard, is competent to meet the first test for choice of counsel, as set out in ***Fantl CA***. In essence, while avoiding the need for a contest that necessarily arises in carriage applications (paras 53-4), and while acknowledging the record may show some pluses and minuses as to the strength and experience of the competing law firms, I am satisfied that the Consortium is as relevantly competent, as to experience, strength and resources, as Merchant Law, to continue this action. Again, even there, the test is not the best, but the competent. Indeed, I find that Merchant Law relied on Mr. Churko for much of its effort on behalf of the PRP.

2. Improper Considerations – Are there any improper considerations underlying the choice of counsel?

[35] On the record before me, I find no such improper considerations – see paras 63-4 of ***Fantl CA.***

3. Prejudice to the Class – As a result of the choice of counsel?

[36] In spite of the arguments of Mr. Merchant on behalf of the NPRP, I find that there is no serious basis for finding that there is any prejudice to the class.

[37] Rather this case is very much like ***Fantl CA***, at paras 65-8, where the applications brought by Merchant Law are more about "economic prejudice" to Merchant Law than the class, and are thus not relevant. Specifically (para 67):

> The CPA does not, nor was it ever intended to, provide lawyers with a vested interest in the subject matter of the lawsuit entitling them to override the choices of a representative plaintiff in the litigation, including the choice of counsel.

[38] Moreover, in reference to para 68 of ***Fantl CA***, there will be no prejudice to Merchant Law's "investment of time and effort" in the action to date as past counsel, because there is an undertaking from the Consortium to pay fair and reasonable fees and disbursements under the contingency agreement between Merchant Law, and the PRP, at the end of the action, if the PRP is successful. Alternatively, absent consent between the PRP and Merchant Law, I will entertain the Charging Application on its merits if necessary.

B. Other Considerations

[39] I am heartened by the decision to a similar result on a similar issue, in a unique factual situation, by my colleague, Grasser J., in ***LC v. Alberta***, 2021 ABQB 24.

[40] There, Mr. Tinkler (a lawyer with much class proceedings experience), was acting as the litigation representative for a minor prp, EMP[2], and thus, Mr. Tinkler, was, in that capacity, effectively the prp. Mr. Lee was Counsel for the prp, Mr Tinkler (standing in the prp's, EMP's, shoes). In that capacity Mr. Tinkler dismissed Mr. Lee.

[41] In face of this Graesser J held (paras 32 - 43, much of which is, *mutatis mutandis*, relevant here, which is the reason I quote it, (the highlighting being mine and for emphasis as relevant to the case at Bar):

> [32] ... *an application to remove* Mr. Lee as *class counsel was not necessary.* EMP is the only representative plaintiff. Class counsel needs to take instructions from the representative plaintiff. EMP lacked (and still lacks) the capacity to instruct counsel. Even if Mr. Lee technically remains class counsel because he has not been formally discharged by the Court, there is no one to give him instructions in that role. The only person who can give instructions is Mr. Tinkler. *Mr. Tinkler fired Mr. Lee as EMP's* counsel. To the extent that Mr. Tinkler could not fire Mr. Lee as class counsel without a court order, that is really a distinction without a difference. Mr. Lee has no client.
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> [33] ... *Lawyers do not have independent status in the lawsuit in which they have been retained to represent a client. A dismissed lawyer cannot protest and insist that they remain counsel for the client despite the client's clear decision to fire the lawyer*. Mr. Lee had been explicitly instructed by Mr. Tinker to do nothing more for EMP or the class.

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[2] The record is clear that EMP who was then soon to reach his majority was intending to continue to act as prp on his own, without a need for Mr. Tinkler as his litigation representative.

[34] *The [CPA] is silent on court approval of class counsel. Case law on the subject seems clear that class counsel is retained and instructed by the class representative or representatives. The class representative's choice may be impacted by conflicts within the class or conflicts with other parties in the litigation, but I have found no case law suggesting anyone has standing to oppose a decision by the class representative to fire their lawyer.*

[35] The basic law in this area is found in ***Fantl***.... Those cases [ONSC, ONDC and ONCA] spell out the rights of the representative plaintiff to select and instruct counsel, direct the litigation and authorize settlement. Other class members may apply for the right to participate in the decision-making process, a right that is given by s 16 of the [*CPA*]. [3]

[36] *The **Fantl** decision[s] arose in the context of the dissolution of the law firm that had been retained by the representative plaintiff.* Two new law firms resulted. The lawyer with the closest personal relationship to the plaintiff was at one; the lawyer with the greatest involvement in the litigation was at the other. The plaintiff chose his friend's firm.[4] The most involved lawyer's new firm applied to set aside the notice of change of solicitors on the basis that it was in the best interests of the class that this new firm continue with the litigation. The application was dismissed by the case management judge and the appeal was dismissed.

[37] Most important for the purposes of this decision is the Ontario Court of Appeal finding at paras 43-44:

> [43] *The motion* under appeal *was brought pursuant to s. 12 of the [Ont] CPA. The appellant argues that a notice of change of solicitors should not have been delivered without first obtaining an order of the court on motion brought by the representative plaintiff, so as to have the court approve the new class counsel.* Further, the appellant contends that this determination should only be made on the basis of the "best interests of the class".
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> [44] *I disagree.* The position advanced by the appellant appears to be an attempt to combine certain developed principles of class action jurisprudence so as to elevate the court's supervisory role over the proceeding to one of mandatory intervention. While it is true that the court has a responsibility to the absent class members, the prosecution of the action rests squarely with the representative

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[3] However, this section of the *CPA* only allows the court to "substitute another class member ... as the representative plaintiff", "[f]or the purposes of ensuring the fair and adequate representation of the interests of the class": see ***Fantl ONSC***, para 7. That is not the situation in this case. Moreover, there is no issue here of new Class Counsel having a conflict of interest – see ***Singh v. RBC Insurance Agency***, 2020 ONSC 5368.

[4] In essence the same situation, with some differences, arises in the case at Bar. As a result of the dispute between Mr. Churko and Merchant Law, two separate firms resulted, Merchant Law remained and KoT Law was formed. The lawyer with the closest professional relationship to the PRP, Mr. Churko, was at KoT Law; and the lawyer who was the head of the Merchant Law, Mr. Merchant, was at the other. The plaintiff chose Mr. Churko.

> plaintiff. *The representative plaintiff in a class action lawsuit is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report.*
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> [38] In practical terms, nothing has been happening to move the action itself, other than the dispute between Mr. Tinkler and Mr. Lee. The [Defendant] ... has been sitting back, watching and waiting the outcome of these applications.[5]
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> ....
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> [41] ... the absence of a formal application by Mr. Tinkler to have Mr. Lee removed as class counsel for the child class is moot. *A lawyer without a client has no independent interest in the lawsuit.*
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> [42] That is illustrated in ***Fantl***, where the Court of Appeal stated at para 66:
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> > [66] There is no question that class proceedings are entrepreneurial in nature. However, the proposition advanced by the appellant (that counsel have an independent interest in the class proceeding) would only be supportable if the creation of an entrepreneurial class-action bar was a policy goal underpinning the [Ont] CPA[6]. This argument fails because as far as the [Ont] CPA is concerned, the entrepreneurial lawyer is a means to an end, not an end in and of itself. Were it otherwise, one of the criticisms of the [Ont] CPA, that it promulgates plaintiffless [sic] litigation benefiting only the lawyers involved, would be well- founded. Such is not the case.
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> [43] Mr. Lee had been removed as EMP's lawyer; EMP was the child class sole representative. Mr. Lee may have remained "solicitor of record for the child class", but that would be analogous to being the solicitor for an out of province corporation: an address for service, but with no capacity to act absent instructions from the client. *Class proceedings belong to the class members, not the lawyers representing them.*

[42] In essence, in quite similar, but not identical circumstances, these views represent my views, *mutatis mutandis*, as compared to the case at Bar. Thus, this gives me confidence to now issue this Memorandum, for the reasons above, without fully reviewing all the submissions of the parties and an analysis of the issues, while reserving the right to issue supplementary reasons, if I deem it necessary or advisable in the future.

Application for Certification

[43] The briefs and oral hearings on certification concluded on January 9, 2019, over two years ago. Moreover, the PRP now has new Counsel – the Consortium. Thus, the Court needs to know, within the next 30 days, whether either party is content with the current certification record, or wants to add to it, subtract from it, or change it, for any good reason. If they are

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[5] Again, that is the case here, due to the dispute (and Covid-19) the action has been dormant for over two years, from January 9, 2019 to February 23, 2021.

[6] I find the *CPA* to be to the same effect as the *Ont CPA*.

content, I will "pick up my pen" and issue a certification decision in due course. If they are not content, and wish to make further submissions, they are directed, within that 30 day period (unless extended by the Court on application within the 30 days) to provide a draft consent procedural order for the Courts approval, or, absent consent, to set up a further case management hearing.

Ancillary Applications

[44] I am sure that I don't have to invite the parties to make (or renew) any ancillary applications that arise from events since January 9, 2019, but if they do, they may bring them or renew them within 30 days (unless extended by the Court on application within the 30 days).

Costs

[45] As a result of my decision herein, Merchant Law is not entitled to costs against the class for taking steps to deny the change of counsel or for being unsuccessful in its Substitution Application. Indeed, the Consortium and or the PRP are, *prima facie*, entitled, as against Merchant Law, for the latter. This may require further applications before the Court, absent settlement of such costs or potential costs.

[46] Thus, the PRP is, *prima facie*, entitled to costs of this application as against Merchant Law. If that result is accepted, then the parties have 30 days to settle the amount of those costs as between themselves, or for a consent order of the Court. If not accepted and/or settled, the parties, or either of them, may apply to the Court or the Assessment Officer (depending on their respective jurisdictions) within 30 days (unless extended by the Court on application within the 30 days).

[47] If the Defendants have any claim for any "costs thrown away" while being on the sidelines during this dispute, absent settlement thereof, they may also apply to the Court for such a result within 30 days (unless extended by the Court on application within the 30 days).

Conclusion

[48] For the reasons above, PRP's Notice of Change of Representation is acknowledged and the Consortium is her Counsel for the continuation of the certification application herein.

[49] The Substitution Application is dismissed.

[50] Existing or new ancillary applications and costs have been directed above.

Heard on the 23rd day of February, 2021.
Dated at the City of Calgary, Alberta this 21st day of April, 2021.

J.D. Rooke
A.C.J.C.Q.B.A.

Appearances:

C. Docken, M. Farrell, C Churko,
for Fiona Singh

E.F. Merchant, Q.C., A.A. Tibbs,
for Mary Auch

K. Findlay, S. Jenkins,
for the Defendants[7]

[7] The Defendants took no part in these applications but filed submissions in relation to ancillary issues against the PRP relating to costs thrown away which issues have been held in abeyance pending on these Reasons, and for which I have dealt with (*supra*).