

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JEFFREY CHARLES BONDY and
NICOLAS JOHN MacPHERSON

Plaintiffs

- and -

TOSHIBA OF CANADA LIMITED and
TOSHIBA CORPORATION

Defendants

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)
) William V. Sasso and Jasminka Kalajdzic,
) for the Plaintiffs
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) David O'Connor and Adam Dewar, for the
) Defendants
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) **HEARD:** December 4, 5 and 6, 2006

A Proceeding under the *Class Proceedings Act, 1992*

Brockenshire J.

REASONS FOR DECISION

[1] In this proposed class action, the plaintiffs move for certification, after the defendants moved unsuccessfully to strike out the statement of claim, as disclosing no cause of action, but before the filing of a statement of defence by the defendants.

OVERVIEW

[2] The individual plaintiffs allege that they and over 3000 other persons in Canada purchased a Toshiba Satellite 5000 Series Computer Notebook ("Notebook") designed and manufactured by Toshiba Corporation ("Toshiba") and distributed and marketed in 2001 and 2002 in Canada by its wholly owned subsidiary Toshiba of Canada Limited ("TCL"). They allege that the notebook was touted as the "ultimate multimedia machine", having 1.1 GHz

Pentium ® III processing power. They allege the Notebook was targeted at “early adopters” (an expression used in the trade for those that buy the newest and most advanced products available) and “gamers” (persons interested in playing multimedia computer games). The alleged attraction was the high processing speed of the laptop. It was further alleged it was priced at a premium for this enhanced performance.

[3] The individual plaintiffs allege that in fact the Notebooks would unexpectedly and spontaneously shut down or not operate at full capacity. They further allege the defendants attempted to address the problem by posting a series of “basic input output system” (“BIOS”) updates on the Toshiba website and inviting customers to install them; which however only created other problems since they caused the Notebooks to “throttle back”, resulting in lock ups, stalling and severely sluggish performance. As a result, the individual plaintiffs alleged they could not utilize their Notebooks to run multimedia or gaming programs, for which they were intended.

[4] The allegation is that these problems were caused by a common defect, namely that the cooling system was inadequate to dissipate the heat generated by the Central Processing Unit (“CPU”), which caused the Notebooks to overheat, shut down or otherwise fail to perform at the high processing speed expected of a 1.1GHz Pentium III CPU.

[5] The individual plaintiffs allege that Toshiba and TCL gave a one-year warranty to repair or replace Notebooks with problems, but despite the defendants being contacted, the Notebooks were neither satisfactorily repaired or replaced.

[6] The defence responded with a number of arguments against certification. The defence notes there was no allegation that the Notebooks failed to perform properly when performing non-intensive processor tasks – the type of task usually performed on a Notebook. The defence argues that dissatisfaction or performance problems experienced by two or three users does not establish that over 3000 purchasers all had similar problems, and suggests that because Notebook owners who are satisfied with their machines might be included, that the proposed class is overly broad. The defence further alleges that the plaintiffs do not have reliable evidence to demonstrate any alleged design or manufacturing defect on a class wide basis. The defence further alleges that it has tendered evidence to the effect that to establish performance degradation in any Notebook would require an individual expert assessment of that Notebook.

[7] Further, the defence argues that a breach of warranty claim cannot be sustained on a class wide basis because only those persons who allege they suffered a failure by reason of the alleged design defect, and brought in their Notebook for repair within the one year warranty period, and who could show that the warranty provider failed to remedy the problem could have an action for *breach of warranty*.

[8] Further, the defence alleges that the plaintiffs have not demonstrated there is any evidence establishing any class wide misrepresentation. The named plaintiffs simply presented their differing assumptions as to what performance they understood the laptop CPU could or should provide.

[9] The defence alleges that to resolve the claims by any class member a trial will be needed of all issues of liability and damages for each of the class members, so that a class proceeding is not the preferable procedure.

[10] Further, the defence alleges that the proposed representative plaintiffs cannot fairly and adequately represent the class because of their unique experiences and further, the plaintiff Bondy has provided evidence that his own Notebook was stolen from his car and he received the full replacement value of it from his insurer so that he has no damage claim at all.

THE STATUTORY FRAMEWORK

[11] The Ontario *Class Proceedings Act (CPA)*, 1992, S.O. 1992, c.6 requires that to obtain the benefit of the statute an action has to be certified. In this case, the statute would require the court to find that:

- a) the pleadings disclose a cause of action;
- b) there is an identifiable class of two or more persons that would be represented by the representative plaintiffs;
- c) the claims of the class members raise common issues;
- d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- e) there are representative plaintiffs who;
 - i) would fairly and adequately represent the interest of the class;
 - ii) have produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying the class members of the proceeding; and
 - iii) do not have, on the common issues for the class, an interest in conflict with the interest of the other class members.

[12] In meeting the requirements of s. 5, an applicant for certification is assisted by s. 6, which provides that the court shall not refuse to certify solely on any of the following grounds:

- 1) The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
- 2) The relief claimed relates to separate contracts involving different class members;
- 3) Different remedies are sought for different class members;

- 4) The number of class members or the identity of each class member is not known;
- 5) The class includes a sub-class whose members have claims that raise common issues not shared by all class members.

[13] The *CPA* was passed in 1992, to take effect January 1, 1993. The goals of the *CPA*, as identified in the study leading to it, the debates during its introduction, and the judicial interpretations that followed are judicial efficiency, access to justice and behaviour modification. The *CPA* is to be given a generous, broad, liberal and purposive interpretation. It is a procedural statute. The first step, necessary to enjoy the special procedural benefits of the *CPA* is certification, but that is a procedural rather than a substantive step. The certification motion is to focus on the form of the action rather than on whether the action is likely to succeed on the merits. See *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 16. The onus is on the moving party for certification, but the evidentiary burden is simply that:

...the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists.

See *Hollick*, *supra* at para. 75.

DO THE PLEADINGS DISCLOSE A CAUSE OF ACTION?

[14] This issue was tested in a Rule 21 motion brought before me on February 27 and 28, 2006 by the defence. In my decision thereon released April 21, 2006 I did not find that it was "plain and obvious" that no claim exists in relation to any of the causes of action pleaded by the plaintiffs. I did give leave to the plaintiffs to provide further particulars of representations made generally or to them, and the plaintiffs did make such an amendment. The defence moved again to strike, on the basis that the particulars were insufficient to support the misrepresentation claim, and by endorsement of August 30, 2006 I dismissed that motion.

[15] In *Sauer v. Canada (Attorney General)*, [2005] O.J. No. 4237 (Super. Ct.), Master MacLeod at para. 2 of his endorsement quotes an endorsement of Winkler R.S.J., the class proceedings judge in the action, noting that a motion under Rule 21 will also be dispositive under s. 5(1)(a) of the *CPA* for purposes of the certification motion. Paragraph 2 of Master MacLeod's endorsement continues, saying:

A defendant in a class proceeding may have recourse to Rule 21 but if unsuccessful may not subsequently reargue the question of whether or

not the pleadings disclose a cause of action. The test under s. 5(1)(8) of the Act is essentially the same as that under rule 21.01(1)(b).

[16] The foregoing was accepted by the defence in argument on this certification motion, and no argument was presented by the defence under subsection 5(1)(a) of the *CPA*.

[17] I therefore find, on the basis of the concession of the defendants and my previous findings on the Rule 21 motion, that the statement of claim as amended discloses several causes of action.

IS THERE AN IDENTIFIABLE CLASS?

[18] The proposed class definition is “all persons in Canada who purchased a Toshiba Satellite 5000 Series Computer Notebook.”

[19] The materials filed on this motion by the plaintiffs show that there were approximately 3223 persons in Canada who purchased one of these Notebooks, which were marketed in Canada from approximately October of 2001 to July of 2002.

[20] The defence did not directly argue against that definition. The defence did however argue that there should be some amendments to the proposed definition. The defence sought to have any purchasers who were also employed by the defendants excluded from the class “to avoid any conflict of interest”, sought to have the class limited to purchasers of new Notebooks, and sought to have the class limited to those who still own the Notebook.

[21] I fail to see why all the employees of the defendants should be denied “access to justice” if they happen to be a purchaser of one of the impugned Notebooks. I also fail to see how a low level employee could be in a conflict of interest simply because he or she happened to be a member of this class. If such an employee was called upon to be a party to a hearing as to individual damages that might be a different story, but that could be dealt with at that time.

[22] I think the point raised by the defendant that the class be limited to purchasers of new Notebooks and not those that purchased a previously used Notebook is a good one. In argument before me, it appeared to be assumed that the class members would be people that bought these Notebooks new. I would assume anyone that bought one of these Notebooks from an original purchaser would have a claim primarily against the person he bought from, and so have a different interest than other members of the class. However tied into that I do not see why the class should be limited to those who still own the Notebook. The damage if any, to which an individual class member would be entitled would relate to the period of ownership of that person, and selling or otherwise disposing of it may be a factor in mitigation of damages which should be dealt with on an individual level, but surely would not completely extinguish a claim. Defence counsel later, in argument, raised the further point that the purchase should not be for the purpose of resale, to keep retailers like Future Shop out of the class. I agree with that.

[23] I accept that there is an identifiable class of two or more persons. I accept the definition of that class as proposed by the plaintiffs, with the addition of a designation therein that the

Notebook complained of was purchased as new, or previously unused, and was not purchased for the purpose of resale. If there are issues relating to that addition to the definition submissions can be made to me, orally or in writing, as counsel may elect.

[24] Before leaving this section, I would note that the defence raised the argument that for certification, the plaintiff has to establish there are enough persons willing to pursue a claim to make the whole process worthwhile. *Dumoulin v. Ontario*, [2006] O.J. No. 1233 (Super. Ct.) was cited. Plaintiffs' counsel indicated that the defendants had records of the number, and type, of complaints it had received about the Notebooks, but declined to produce that information. Plaintiffs' counsel further responded in argument that they had set up a web page and a 1-800 number and had a considerable number of contacts from other purchasers of these Notebooks. In my view, that information, while not fleshed out, is sufficient to overcome the defence objection to certification. If later, the defence could be able to demonstrate a genuine lack of interest by class members in pursuing their claims, a motion to de-certify could always be brought.

[25] The defence also raised the argument that part of the claim put forward was a claim for breach of warranty to repair or replace. The defence argued that the claimants under breach of warranty would have to establish that they had individually actually made a claim under the warranty provisions, and therefore suggested that a separate class should be created containing only those entitled to make such a claim.

[26] No statement of defence has as yet been filed. The statement of claim, in paragraphs 20 and 21, simply recites the part of the warranty document, referring to a one year warranty, during which time, should the product fail, Toshiba would repair or replace the defective part. The defence, in its motion record, at pages 69 and 190 reproduces two different warranty documents, neither of which seem to explicitly make it a condition that a claimant has to bring in the laptop for warranty work. The general position of plaintiffs' counsel is that the basic claim being put forth is that of a design fault in these Notebooks, with the warranty claim being subsidiary to that. However, their position is that Toshiba knew or should have known of the design fault, and failed to recall the Notebooks and repair or replace them.

[27] At this stage I see no need for creating a second class. If, as the case develops, it appears that a specific claim by the Notebook owner is required to trigger the warranty, a separate class could always be created, or alternately, a pre individual hearing screening question could be put to individual class members.

[28] Incidentally, this will be a national class. There was no argument from either side about this. It appears that the factual situation underlying this action fits into the criteria established in *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (Gen. Div.), and the cases that followed it, and that national class actions are now very much an unremarkable part of class proceedings litigation in Canada.

ARE THERE COMMON ISSUES?

[29] The plaintiffs propose the following list of common issues:

- (a) Were the defendants, or either of them, negligent in designing, developing, manufacturing, testing and selling the Notebooks?
- (b) Did the defendants negligently misrepresent that the Notebooks were the "ultimate multimedia machine" with 1.1 GHz Pentium® III processing speed?
- (c) Did the defendants breach section 52 of the *Competition Act*?
- (d) Did the defendants breach their warranty and if so, what is the remedy?
- (e) Are the defendants liable in damages to the Class Members, and if so, in what amount?
- (f) Pursuant to s. 24 of the *CPA*, should the court determine part or all of the defendants' liability to the Class Members? If so, what is the partial or aggregate award and against whom is it to be assessed?
- (g) Should one or both of the defendants pay punitive damages to the Class Members? If so, who, why, in what amount and to whom?
- (h) Is prejudgment interest payable? If so, by whom, and at what rate?
- (i) Who should pay the cost of administering and distributing amounts to which the Class Members are entitled and how, and when, should such cost be determined?

[30] The defence raises two general preliminary objections to this list. The first is that there are two defendants. The defence position is that TCL is the Canadian marketer and distributor of the Notebooks, while Toshiba is the designer and manufacturer. Therefore, common issue (a), for instance, should relate to Toshiba only and common issue (b) should relate to TCL only. The evidence available to date is that TCL is a wholly owned subsidiary of Toshiba. That alone may well establish joint liability. Further from the little I have seen of the promotional materials, specification sheets etc., it is unclear which corporation said what. I think, in this situation, that the form of wording used in (a) – "the defendants or either of them..." would be more appropriate in (b), and avoid the argument that to establish a common issue, it is necessary to show liability of both of the defendants in regard to that issue.

[31] The other preliminary argument by the defence is that the proposed common issues related to damages are not appropriate as any damages at issue in this proceeding are inherently individualistic. Quite simply, plaintiff's counsel do not agree with this proposition, so that the proposition itself will constitute part of the argument at the common issues trial. It is premature to attempt to deal with that issue at this point in the litigation.

[32] By way of a preliminary submission in relation to the common issues, plaintiffs' counsel states the definition of "common issues" under the *CPA* as:

- (a) common but not necessarily identical issues of fact, or
- (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[33] *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.) and *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) are cited as authority for the propositions that this broad definition was used by the legislature "to avoid setting the bar for certification too high." Further, "resolution through the class proceeding of the entire action, or even resolution of particular legal claims...is not required." *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 537 at para. 39 is quoted for the additional proposition that:

One underlying question is whether, if the action continues as a class proceeding, will "duplication of fact-finding or legal analysis" be avoided.

[34] While I agree with the above statements by plaintiffs' counsel, I note that similar statements have been made in many of the class action cases. I would add the further statement of the Chief Justice in *Western Canadian Shopping* in the first full paragraph on page 555:

...With regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.

WERE THE DEFENDANTS NEGLIGENT

[35] It is the plaintiffs' contention that the design of the Notebooks in question was defective, in that the cooling system inside the Notebook could not effectively dissipate the heat produced by the high powered CPU resulting in the CPU overheating and throttling or shutting down. The preliminary report of the plaintiffs' expert is that this is a defect which by its nature would be common to all of the Notebooks and would be objectively measurable on a class wide basis.

[36] The basic position of the defendants in response to that is found at paragraph 113 of the defence factum stating:

[T]he plaintiffs have adduced no reliable evidence to demonstrate that any alleged design or manufacturing defect can be established on a class wide basis or that the experience of the plaintiffs with their Notebooks can be extrapolated across the entire class.

The following paragraphs, and indeed a number of paragraphs in the defence factum deal in great detail with the fine points of computer design, computer usage, the operation of computers, and the uses usually made of Notebooks. Plaintiffs' counsel objects that all of this is improperly bringing forward expert opinion evidence on these issues. The point of the objection is that certification is not the appropriate stage of the action to weigh competing expert evidence on the merits. *Cloud v. Canada (Attorney General)*, *supra*, is cited. I agree with the position of plaintiffs' counsel. In *Cloud*, the Chief Justice in *Hollick* at para. 25 is quoted where she said:

In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action.

Cloud goes on to state that *Hollick* makes it clear that this doesn't entail any assessment of the merits at the certification stage, and adds that on a certification motion the court is ill equipped to resolve conflicts in the evidence or to engage in "finely calibrated assessments of evidentiary weight" (at para. 50). *Cloud* states that "what it must find is some basis in fact for the certification requirement in issue" (at para. 50).

[37] What I have before me is some evidence, over and above the pleading itself, that the cooling system in this Notebook was deficient, that that resulted in the CPU overheating, and that resulted in the Notebook throttling or shutting down, and further, because this was a design error in the cooling system, it would be found in all of the Notebooks. From that information alone, if it withstands the test of the trial, it could be inferred that the defendants had been negligent in designing the cooling system, or perhaps negligent in manufacturing the cooling system, and being negligent in testing the Notebook to ensure that it would not only work, but work as the "ultimate multimedia machine" it was held out to be.

[38] As there is evidence, apparently, from the experts on both sides that these Notebooks might well have performed the usual day to day operations expected of ordinary run-of-the-mill laptops, to succeed, the class would have to be able to show that when the Notebooks were called upon to repeatedly perform complex and difficult operations, they would slow down or stop. The litigation would be materially advanced by proving this once, and a class proceeding would avoid each class member having to individually prove this. The concept of determining once if a product is defective, has been accepted in, among others, *Chase v. Crane Canada Inc.* (1996), 5 C.P.C. (4th) 292, affirmed 14 C.P.C. (4th) 197 (B.C.C.A.) and *Nantais v. Telectronics* (1995), 25 O.R. (3d) 331 (Gen. Div.), with the appellate court commenting in *Crane* that "This seems exactly the type of question for which a class action is ideally suited..."

[39] I accept the negligence issue, as stated, and, as suggested in para. 30, amended, as a common issue.

NEGLIGENT MISREPRESENTATION

[40] Plaintiffs' counsel puts forth two alleged misrepresentations – that the Notebooks were the "ultimate multimedia machine", and that they possessed 1.1GHz Pentium® III processing speed. This is of course closely related to the allegation of negligence, as the negligence

allegation centres around establishing that when the owners of these Notebooks attempted to operate them as would be implied under the description "ultimate multimedia machine" they would not operate at 1.1GHz Pentium® III speed but instead operated at a much lower speed, if they operated at all. Plaintiffs' counsel sees the inquiry re this common issue as focusing on the defendants rather than the conduct of the class members. Plaintiffs' counsel cite *Carom v. Bre-X, supra*, and *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (Super. Ct.) as examples of cases in which the issues of the knowledge and conduct of the defendants, in relation to statements made, were treated as common issues.

[41] The defence, from many pages of its factum and at length orally, was at pains to point out that the tort of negligent misrepresentation involves not only an untrue, inaccurate or misleading statement, made negligently, but also a duty of care to the representee, who relied upon the misrepresentation and suffered damages thereby. I accept that what is put forth here as a common issue is not all of the elements of the tort, but simply the elements of untrue, inaccurate or misleading statements, made negligently.

[42] In my view, if the plaintiffs could establish that the common understanding of the words purportedly used were as the plaintiffs suggest, and that the misrepresentations were made, then this would materially advance the litigation. Obviously, so would the proof of a duty of care to the proposed purchasers.

[43] If individual class members could come forward and show that they relied, in a reasonable manner, on the misrepresentations, and suffered damage as a result of the representation, they would have individual claims for the amount of damage suffered and if it could be shown that generally all the class members relied on misrepresentations and suffered damages, a claim for aggregate damages may be made out.

[44] But even far short of this, in my view it is arguable for a class member, or for the class as a group, to say that they did not read the descriptive words "ultimate multimedia machine" or the specific descriptive words for the speed and type of CPU in the Notebook when they bought it but bought simply on the generalized understanding that this was the best and fastest notebook on the market, and then when they found it wasn't fast or that it didn't go, to be entitled to go back, to look at the representations made and the specifications provided by the maker and seller, and complain that the machine did not live up to the promises held out. To put it more briefly, a finding of inaccurate statements made negligently could strengthen a claim for damages for negligence, weaken a defence denial of negligence, and perhaps ground a claim for punitive damages.

[45] I find the plaintiffs have given a factual basis for the conclusion that the defendants did use the specific words complained of, and that in at least some circumstances, which may have been common among class members, the words were untrue.

[46] I accept the common issue of negligent misrepresentation, as proposed by the plaintiffs, as a common issue.

SECTION 52 OF THE *COMPETITION ACT*

[47] This is simply a repetition of the allegations of negligent misrepresentation, but couched in statutory terms. The defence points out that there is a specific limitation under the *Competition Act*, R.S., 1985, c. C-34 which may well be effective in blocking the statutory claim. However, the defendants have yet to file a statement of defence, and a limitation period is something to be raised specifically by the defence in its pleadings. At this time, I see no reason why breach of the *Competition Act* should not be a common issue.

BREACH OF WARRANTY

[48] Plaintiffs' counsel put this as a double issue – did the defendants breach their warranty and if so, what is the remedy? Plaintiffs' counsel, in their factum, put it that this issue involves the interpretation of a contract and is focused on the conduct of the defendants under that contract. They put it that “if the plaintiffs are successful at the trial of the common issues in proving a negligent design and distribution of the Notebooks, then the applicability of the warranty to a common design defect need only be assessed once.”

[49] The defence, in its factum, note that the claim put forth in relation to the warranty is that “the Notebooks did not perform in accordance with their specifications”. The defence therefore says that if misrepresentation is not certified as a common issue, the warranty claims should not be either.

[50] In volume one of the responding party's motion record, at page 190, what I understand to be the warranty document included with all of these Notebooks is reproduced. It is a one-year warranty that the Notebook is free of defects in workmanship and material under normal use for the period of one year from the date of purchase. It provides that should the product fail during normal and proper use within the warranty period, Toshiba will, at its option, repair or replace the defective part. It states that the sole remedy shall be repair or replacement as provided above, and that Toshiba will not in any event be liable for any damages in excess of the purchase price of the product.

[51] At page 69 and following in the defence motion record is wording in the instruction manual, included with these Notebooks, relating to the warranty, which appears to contain further limitations on the warranty including a disclaimer that: “Toshiba makes no guarantee or warranty that this product will function properly in all circumstances.”

[52] I agree with counsel that the warranty issue is a subsidiary one. However, if these documents were provided to all of the Notebook purchasers, and I have nothing to show that they weren't, then the interpretation of the provisions of the warranty documents would be a common issue, and important to all of the class members, and perhaps also to the defendants. As plaintiffs' counsel put it, since the warranty documents were provided to each class member, the interpretation of it will determine one basis of the defendants' potential liability to the class.

[53] I accept this as a common issue.

OTHER PROPOSED COMMON ISSUES

[54] The remaining proposed common issues on the list deal with damages, aggregate damages, punitive damages, pre-judgment interest and costs of administering and distributing amounts. Plaintiffs' counsel point to *Cloud v. Canada, supra*, *Carom v. Bre-X, supra*, *Rumley v. British Columbia* [2001] 3 S.C.R. 184 at para. 34 and *Healy v. Lakeridge Health Corp.*, [2006] O.J. No. 4277 (Super. Ct.) at para. 103, as cases in which claims for aggregate assessment of damages and punitive damages have been accepted as common issues. *Prima facie*, on the material provided by plaintiffs' counsel, all of these issues would be common to the class members.

[55] The defence argues that the amount of damages would vary between class members depending firstly, on whether individuals noticed any performance degradation at all, and then the extent of it, what if any efforts the individual made to mitigate, the extent to which individuals continued to use their Notebooks for simple tasks, the price each individual paid for their Notebook, and the residual value of the Notebook.

[56] All of these issues will undoubtedly be fleshed out as the action progresses. At the moment, there is still not even a statement of defence. However even at this stage, I have no difficulty in imagining a possible aggregate damage award of some amount, with some system for aggrieved class members to make claims for individual supplemental awards.

[57] In my view, all of these issues would be of at least common interest to all the members in the class, even if it could be shown that they were not applicable directly to each class member. The resolution of each of these issues would advance, and indeed may be important to finalize the litigation.

[58] I accept all of these subsidiary issues as common issues.

PREFERABLE PROCEDURE

[59] I accept the statement put forth by plaintiffs' counsel, quoting from *Cloud, supra*, at page 420 that:

...the preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of the class members.

[60] In addition to this, Goudge J.A. stated, as summarized later by Rosenberg J.A. in *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.) at 664-665 that:

The analysis must keep in mind the three principle advantages of class actions: judicial economy, access to justice, and behaviour modification.

This determination requires an examination of the common issues in their context, taking into account the importance of the common issues in relation to the claim as a whole.

The preferability requirement can be met even where there are substantial individual issues; the common issues need not predominate over individual issues.”

[61] Here, we have a national class of over 3000 persons, all claiming that the Notebooks they purchased did not perform as had been held out, that they had paid a premium price to obtain outstanding performance, and did not get it, and that although Toshiba warranted that if there were problems they would fix them or replace the Notebooks; in fact, Toshiba did neither.

[62] There is no other judicial remedy that could deal with these claims from persons across Canada except a national class action. Because these are essentially property claims, there is no national legislative scheme that can deal with these consumer complaints. It appears there will be a “battle of the experts” over whether or not there was in fact a design fault, or negligence in the manufacture and testing of these Notebooks, with the plaintiffs’ expert being located in California. The plaintiffs’ position is that individual claims would not exceed \$3,000.00. In this situation, the following quote from Zuber J., in refusing leave to appeal from the trial decision in *Nantais v. Telectronics Proprietary (Canada) Ltd., supra*, at 347 is apropos:

The stupendous financial burden of a case such as this would consume all or almost all of the proceeds of the judgment of any single plaintiff. The defendants (if responsible) would likely therefore be insulated from any of these claims because of financial consequences alone. It is only by spreading out the cost that the members of the class have any chance of success. Not only is the class proceeding preferable, it is the only procedure whereby members of the class will have any real access to the courts.

[63] The defence argues that where the question of the preferable procedure depends on disputed questions of fact, those questions of fact must be decided on the motion to certify the proceedings and not at a trial of common issues. The authority cited for that is *Dumoulin v. Ontario, supra*.

[64] In that case, Cullity J. was dealing with a claim that toxic mould at the Newmarket Courthouse caused illness and damages to hundreds of court employees and others. He had before him scientific and medical evidence that the effect of mould differs greatly from one person to another, and that the symptoms being attributed to exposure to mould in fact could have arisen from a multitude of other causes. This raised a situation where the numerous defendants could have been embroiled in a very complicated proceeding out of which very few if any actual individual claims could be made out.

[65] In my view, the situation here is far different. To succeed, plaintiffs’ counsel will have to establish at a common issues trial that there was a design fault that was common to all of the

Notebooks, and that would produce similar problems in all of them when the Notebooks were called upon to perform complex work. Ancillary to that, plaintiffs' counsel would have to establish that the defendants had held out the ability of these Notebooks to perform complex work without problems, and that the defendants did not satisfactorily repair or replace the Notebooks when the problems became known. Only after that would the focus turn to the individual issues, if any, of the class members.

[66] The defence also argues that the individual issues would overwhelm the common issues in this action. In my view that has not been established. This may well be a case where aggregate damages would be satisfactory. It might also be a case where summary judgment procedures could be used to establish the particular situation of particular plaintiffs. The *CPA* authorizes a variety of ways to deal with individual issues, which could be adopted to this case.

[67] I conclude that a class proceeding would be the preferable procedure for the resolution of the common issues in this case.

THE PROPOSED REPRESENTATIVE PLAINTIFFS

[68] Plaintiffs' counsel propose that the plaintiffs, Messrs. Bondy and MacPherson continue on as the representative plaintiffs in the class action. Both swore affidavits, found in the motion record for certification of the plaintiffs.

[69] Mr. Bondy, per his affidavit sworn last May, was 23, lived in the Town of Amherstburg, has a diploma in computer systems technology – networking – from St. Clair College and works as a tier I technical support at Managed Network Systems Inc. In April 2002 he purchased his Notebook from Staples in Windsor for \$2,999 plus tax. He believes he sent in the manufacturer's warranty registration card. He had problems with the Notebook noting:

“After running for less than one half hour, the Notebook became hot to the touch. The Notebook throttled back and performance became very sluggish, to the point where I could not run the programs I needed to run.”

He went to the Toshiba websites seeking help, and downloaded several BIOS updates as instructed on the Toshiba websites which didn't resolve the problem. He took his Notebook in for repair at an authorized Toshiba service centre in Windsor. That did not help. He phoned the Toshiba Canada head office in Markham, Ontario on more than one occasion, was told that the problems with the Notebook were “being investigated” but no one ever got back to him with any solutions or suggestions. Because of his background in computer science he has some understanding of the nature of the defect in the Notebook. He is prepared to act as a representative of the class, understands what that involves, and has been actively involved in the prosecuting of this action to date. However, his own Notebook was stolen from his car on November 2003 and was never recovered. I understand he made an insurance claim re the Notebook, and the insurer responded.

[70] Mr. MacPherson, per his affidavit of May 8, 2006 advises he is 27 years old, lives in Windsor, studied computer science at St. Clair College in Windsor and is also employed at Managed Network Systems Inc. as a systems administrator in tier II technical support. He purchased his Notebook from the Future Shop in Windsor for \$2,899 plus tax. He, and Mr. Bondy were both aware of the "ultimate multimedia machine" advertising for these Notebooks, and the claim they were equipped with Intel Pentium® III 1.1 GHz desktop processors. Mr. MacPherson specifically says he bought this Notebook because he wanted portable access to multimedia presentations and multimedia content creation. He says he experienced problems with performance. After running for only one half hour the Notebook became very hot to the touch and performance became extremely sluggish. He could not run more than one processor-intensive task at a time and occasionally experienced unexpected automatic shutdowns. He went to the Toshiba website, and downloaded several BIOS updates which did not resolve the performance problems but in fact made matters worse. He took his Notebook in for repair on four or five separate occasions, always to the Future Shop. His information was the Future Shop worked on it themselves, or sent it out to Toshiba in Toronto or Markham or to their local Toshiba service dealer. Despite the several visits, the performance problems remained and he essentially stopped using the Notebook in the fall of 2003 as he found it virtually useless. He too has a computer background, understands what the problem might be, and has actively involved himself in the litigation to date. He has prepared to act as representative plaintiff and understands what that could involve.

[71] Defence counsel object to both Mr. Bondy and Mr. MacPherson. They allege that their complaints are not typical of the complaints of the class members and say that there has to be a common interest between the proposed representative plaintiff and the members of the presumed class. It seems to me that the complaints alleged in the statement of claim about the Notebooks seem to be exactly the kind of complaints these two gentlemen raised in their affidavits, and I suspect the pleading may have been based on their experiences. Whether or not the complaints actually relate to the alleged design fault, or, as the defence argues, relate to other causes, will no doubt be an issue at trial.

[72] Defence counsel raises specific concerns about Mr. Bondy. The defence says he never claimed to have relied upon any representation by the defendants that induced to purchase his Notebook and says contrary to Mr. Bondy's affidavit, that he never brought his Notebook into TCL complaining of any fault. Perhaps most importantly, Mr. Bondy admits that his Notebook was stolen and the defence alleges he received the full replacement value of his Notebook so that he has no claim in damages, and also because his Notebook is gone, it is not possible to confirm whether any performance issues were the result of abuse, software misconfiguration, viruses, failing to properly rid the system of accumulated dust and debris, or any other cause.

[73] Defence counsel allege that MacPherson's Notebook was contaminated with one or two liquid spills which may explain his performance problems. This, the defence says, makes him unable to be fairly representative of most class members, who presumably did not spill liquids into their Notebooks. The defence expert has apparently indicated that MacPherson's Notebook is unique and atypical. This apparently relates to a change he made in his operating system.

[74] The defence also alleges that both of these proposed representative plaintiffs could not be truly representative of the class because they have education and experience in computers and computer technology, and therefore casual Notebook users may be held up against an inappropriately sophisticated level of knowledge.

[75] In argument before me, it was hotly disputed whether any liquid got into MacPherson's Notebook, or whether any spill caused any damage whatsoever. I think that the technical education and experience of Bondy and MacPherson would be a help, rather than a detriment, to the other class members.

[76] I do however, have some concern over the theft of Mr. Bondy's Notebook, and the allegation that he was paid out in full by an insurer. If that allegation is true, Mr. Bondy may be personally estopped from putting forth a personal damage claim. No mention was made of whether the insurer might have a subrogated claim. I do not see this problem as preventing Mr. Bondy from serving as a representative plaintiff through the common issues trial. However, I would think that plaintiffs' counsel would be well advised to see if someone else could be substituted, or be ready to be added if and when Mr. Bondy steps down.

[77] I know, from discussions through argument, that there was another proposed class action commenced in British Columbia, and the intention, not yet crystallized, is that this action, if certified, take over as the lead national action, with the B.C. proceedings to be absorbed in it. Perhaps the B.C. representative plaintiff might make an interesting addition to this action.

[78] In my view, it is advisable, in an action of this sort, to have two or more representative plaintiffs, to avoid procedural difficulties should something happen to one of them. At the moment the two plaintiffs in this action are in my view, well able to represent the members of the class, and I would accept them as representative plaintiffs. However, as above indicated, I would be prepared to add another representative plaintiff, if asked, to serve together with Messrs. Bondy and MacPherson or in place of Mr. Bondy.

[79] I do not find, on the material presented to me, any basis for a suggestion of conflict of interest of Bondy or MacPherson with the interests of other class members, on any of the common issues for the class. Any other person proposed as a new representative plaintiff would have to satisfy that criteria.

THE LITIGATION PLAN

[80] I have reviewed the proposed plan, 57 paragraphs long, in the moving party's motion record for certification, both as exhibit C to the affidavit of Mr. Bondy and as exhibit F to the affidavit of Mr. MacPherson.

[81] Plaintiffs' counsel, Sutts Strosberg LLP, have demonstrated nationally, in many previous class actions that they have "the requisite knowledge, skill, experience, personnel and financial resources to prosecute this class action".

[82] The plan acknowledges that this action will be complicated and expensive, and notes that the plaintiffs have applied to the Class Proceedings Fund for funding. The plan further notes that a website has already been set up as well as a toll-free telephone number so that class members and others can keep updated on the action.

[83] The plan proposes a litigation schedule, a preservation order for information in the hands of the defendant re the class members and their purchases, complaints, etc., an orderly process of document exchange and management, and identifies its expert.

[84] The plan proposes identifying the class members from dealer information or defendants' records, and proposes orderly methods of notifying class members and for an opt out procedure. The plan proposes four days for examinations for discovery, and allows for the possibility of clarification of the common issues after productions and discovery. The plan also acknowledges a willingness to participate in ADR if the defendants are prepared to do so. After all of this, the case should be ready for trial of the common issues.

[85] The plan goes on to provide, if the plaintiffs are successful, for court orders re compensation to identified persons, and *cy-près* distribution for unidentified individuals, with alternate ways of handling aggregate damages. If individual assessments are required by the court, processes of handling claims are set out including the use of an administrator, a referee, and simplified assessments. If a settlement occurs, a notice of resolution process is proposed. Further, the litigation plan proposes that the plan itself will be reconsidered and may be revised under the continuing case management authority of the court, if required, both before and after the determination of the common issues.

[86] The defence objects that the litigation plan doesn't address in particularity how, if the plaintiffs succeed at the trial of common issues, a whole series of different individual issues would be resolved. The plaintiffs hope, of course, is that at a common issues trial, the court would simply order that all of the class members get their money back, plus punitive damages. If that should happen, the distribution plan would seem to be adequate to spread around the wealth. If however, there are each individual issues that would require individual hearings of some kind, after the common issues are resolved, it is my view that the proposals for using a referee (or in my view referees) plus a simplified individual claims and hearing process could quite satisfactorily deal with the problem.

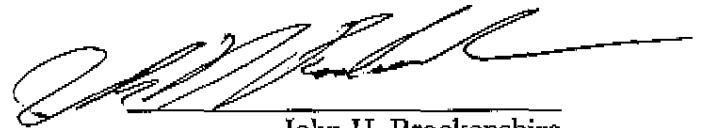
[87] I adopt the statement in paragraph 95 of *Cloud, supra*, cited by plaintiffs' counsel, that "The litigation plan produced by the appellants is, like all litigation plans, something of a work in progress." Further, I adopt the last sentence in that paragraph – "Most importantly, nothing in the litigation plan exposes weaknesses in the case's frame that undermine the conclusion that a class action is the preferable procedure."

[88] I find that the proposed plan sets out a workable method of advancing the proceedings on behalf of the class and of notifying class members of the proceeding, as required by the statute.

CONCLUSION

[89] Having found that this proceeding meets all of the statutory requirements, I certify it as a class action. An order shall go in accordance with sub-paragraphs A through G both inclusive of paragraph 99 of the plaintiffs' factum. The order shall further provide that the plaintiffs shall have leave to amend the class definition, as suggested in para. 22 hereof, and the negligence claim, as suggested in para. 30 hereof.

[90] In order to fix the costs of this certification motion, I would ask that if counsel agree to make submissions orally, an early date be obtained from the trial coordinator. If counsel prefer to make costs submissions in writing, I would ask that the written submissions of plaintiffs' counsel be served and filed within 30 days, the response thereto by defence counsel be filed and served within 20 days thereafter and a reply, if any, be filed and served 10 days after that.



John H. Brockenshire
Justice

Released: March 2, 2007

COURT FILE NO.: 03-CV-1679

DATE: 20070302

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JEFFREY CHARLES BONDY and NICOLAS
JOHN MacPHERSON

Plaintiffs

- and -

TOSHIBA OF CANADA LIMITED and
TOSHIBA CORPORATION

Defendants

REASONS FOR DECISION

Brockenshire J.

Released: March 2, 2007