

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000491-098

DATE: October 14, 2010

IN THE PRESENCE OF : THE HONOURABLE YVES POIRIER, J.S.C.

ELAD BEN-ELI
Petitioner

v.

TOSHIBA OF CANADA LIMITED
-And-
TOSHIBA AMERICA CONSUMER PRODUCTS, L.L.C.
Respondents

JUDGMENT

[1] The Respondents request the authorization to examine the Petitioner in the context of a class action under art. 1002 C.C.P. The Respondents can request this examination only in relation to the four criteria described in art. 1003 C.C.P.

FACTS:

[2] The Petitioner purchased a 2005 model Toshiba television in May 2006.

[3] In February 2009, after approximately three thousand (3000) hours of use, the television stopped functioning. The lamp burned out.

[4] The Petitioner was informed that the manufacturer's warranty did not cover the burning out of the lamp.

[5] For a second time, the Petitioner had to remove the lamp in February 2009 after eight hundred (800) hours of use since that lamp also burned out as well.

[6] The Petitioner initiated a Motion to authorize bringing a class action ("Motion for Authorization") and requested the status of representative.

ISSUE :

At the authorization stage, what are the relevant subjects upon which the Petitioner could be questioned by the Respondents?

THE LAW:

[7] The allegations in the Motion for Authorization must be taken as proven. Accordingly, an examination is not permitted to test the truthfulness of those allegations.¹

[8] The Court may authorize an examination if the allegations in the Motion are vague, incomplete or incomprehensible.²

[9] The examination is not permitted if the purpose is:

1. to contradict the allegations of the Motion;³
2. to permit a pre-emptive investigation to verify if the class action is well founded;⁴
3. to probe the Petitioner's arguments in relation to the merits of the class action;⁵ or
4. to obtain information for the Respondents to have an expertise undertaken.⁶

[10] Finally, of the seven criteria upon which the right to authorize an examination may be granted,⁷ we believe there are four criteria relevant to this case:

¹ Lenzi v. Apple Canada Inc., EYB 2005-99370 (C.S.) at para. 12.

² Carrier v. Québec (Procureure Générale), EYB 2009-120958 (C.S.) at para. 26.

³ *Ibid.* at para. 30.

⁴ Deraspe v. Zinc électrolytique du Canada ltée, EYB 2007-120958 (C.S.) at para 14.

⁵ Larose v. Banque Nationale du Canada, EYB 2009-158991 (C.S.) at para. 8.

⁶ Sigouin v. Merck & Co. inc., EYB 2006-109920 (C.S.) at para. 19.

⁷ As outlined by Mr. Justice Gascon in the case of *Option consommateur v. Banque Amex du Canada*, 2006 QCCS 6290 at para. 20.

- a) the Court must determine whether the precise examinations being sought are appropriate or useful to determine whether the criteria of art. 1003, C.C.P. have been met;
- b) since the facts alleged are taken as proven, and the Petitioner's sole burden is that of "demonstration", prudence should be exercised in determining what examinations may be allowed, if any;
- c) the burden in a motion to examine is on the Respondents; and
- d) any examination that is authorized should be held at the authorization hearing with the subject area of questioning being carefully circumscribed in advance.

DISCUSSION:

[11] The Petitioner's lawyer consents to requests for examination in three (3) specific areas:

1. any information in the Petitioner's possession regarding the alleged existence of a problem with the 2004 DLP televisions;
2. details as to the Petitioner's claim for loss of value or reduced purchase price, loss of use and enjoyment, trouble, inconvenience and loss of time; and
3. a paper "printout" of any website consulted during his "Internet research" alleged at paragraph 22 of the Motion for Authorization, including research pertaining to the existence of a free replacement lamp for his 2005 DLP television.

[12] The Court determines this information is relevant at the authorization stage and is also useful to determine whether the criteria of art. 1003 C.C.P. have been met. Accordingly, the Petitioner will be ordered to provide an affidavit with the information requested and annex (as exhibits) any relevant documents within a delay of ten (10) days from this judgment. If the answers do not satisfy the Respondents, they may submit a Motion to the undersigned to determine the necessity to give further and better explanations or to proceed with an examination, if proven necessary.

[13] Now, the Court will examine each topic suggested for the examination. The references to the paragraphs in quotation marks are to the Respondents' Motion to request the authorization to examine Petitioner.

[14] Pre purchase representations

" Para. 4a) The circumstances surrounding the purchase by the Petitioner of his 2005 DLP television model, including the serial number for his television, the information provided to the Petitioner at the time of his purchase and any representations, written or oral, made to him at the time of his purchase;

para. 7a) The purchase invoice for his 2005 DLP television."

[15] This information is irrelevant at this stage and does not serve any purpose relating to art. 1003 C.P.C. Also, the facts described in the Motion are clear and complete. These questions relate more to the merits of the case and do not assist in testing whether the criteria of art. 1003 CCP have been met. In fact, the Petitioner admits that he lost the proof of purchase and instead, submits the delivery receipt from the store as an exhibit.

[16] Product information and history (including time request):

"Para. 4):

- a) The circumstances surrounding the purchase by the Petitioner of his 2005 DLP television model, including the serial number for his television, the information provided to the Petitioner at the time of his purchase and any representations, written or oral, made to him at the time of his purchase;
- b) The circumstances surrounding the installation by the Petitioner of the 2005 DLP television model in his home and the "mode" (i.e. "Low Power or HI Bright") in which the television was installed;
- c) The details surrounding the Petitioner's use of the 2005 DLP television, including television viewing patterns and the manner by which the Petitioner arrived at the number of viewing hours alleged at paragraphs 20 and 22 of the Motion for Authorization;
- d) Whether he has attempted to determine the exact number of viewing hours by having the DLP television Timer read or reset;
- f) The name of the company or companies and/or the employee(s) or person(s) who installed the replacement lamps referred to at paragraphs 21 and 24 of the Motion for Authorization and whether the DLP television Timer was read and/or reset for each installation;
- g) Whether he disposed of the original lam inside the 2005 DLP television and, if not, its current location and condition;
- h) Whether he disposed of the first replacement lamp purchased at Capri

Electronics (see paragraph 21 of the Motion for Authorization) and, if not, its current location and condition;

- k) His use of the 2005 DLP television since having discovered the alleged "situation";
- l) Whether his television was ever serviced or repaired, when and by whom on each occasion, if any;

Para. 7:

- b) The serial number for his 2005 DLP television;
- c) The owner's manual and any warranty documentation provided with the 2005 DLP television at the time of purchase;
- f) Any and all invoice(s) for installation, service, or repair for this 2005 DLP television which have not already been filed as exhibits in support of the Motion for Authorization;
- g) The number of viewing hours of his 2005 DLP television, as evidenced by a picture of the Timer (taken after the date of this Motion) with which his television is equipped;
- h) Any and all pictures of the DLP television Timer taken prior to the filing of the Motion for Authorization.

Para. 8:

For the purpose of the request at paragraph 7 g) hereinabove, TCL and TACP are prepared to provide the services of an authorized TCL technician to take a picture of the Timer, at the time and place that is most convenient for the Petitioner and in his presence. Alternatively, the television can also be sent to the TCL head office for the same purpose, in which case TCL could provide the Petitioner with a temporary replacement television as necessary;"

[17] All that information is irrelevant at this stage. Moreover, the Petitioner has already provided relevant and clear information on these subjects. For example, the "low power" mode is supposed to last 8 000 hours and at "Hi Bright" is supposed to last 6 000 hours. The Petitioner indicated in his Motion for Authorization that the original lamp lasted only 3 000 hours and the replacement lamp lasted 800 hours. Furthermore, concerning the timer inside the television, the information will not help the Court to verify the criteria in art. 1003 C.P.C. The information from this timer cannot help the Court to confirm the time of the use of the original lamp or even the second one, for that matter.

[18] Communication to/from Toshiba about the alleged problem.

"Para. 4

- e) The name of the person with whom he spoke at Toshiba and who referred him to Capri Electronics (see paragraph 21 of the Motion for Authorization), the date and time of the conversation, and the details of the conversation;
- j) Whether he received a free replacement lamp for his 2005 DLP television, (see paragraph 17 of the Motion for Authorization) and what became of this free replacement lamp, as the case may be;
- m) Any information he has obtained, whether from Toshiba or any third party, prior to and since the filing of the Motion for Authorization. "

[19] This information is irrelevant at this stage. The Petitioner gives specific particulars concerning this topic and the veracity, truthfulness and accuracy of the Petitioner's allegations are sufficient at this stage.

[20] Concerning the production of the original lamp, the sole purpose for the Respondents to obtain this lamp is to have the lamp examined by an expert. Such an expert's examination is not relevant at this stage.

[21] Existence of a group, adequacy of representation and funding:

" Para. 4

- p) The circumstances surrounding the Petitioner's agreement to act as proposed class representative;
- q) His enquiries, if any, regarding the existence of a group including 2004 and 2005 DLP television owners in Québec and in Canada and his efforts, if any, to identify the members of the group and to verify their support for the proposed national class action;
- r) His attempts, if any, to obtain funding from the *Fonds d'aide aux recours collectifs* or any similar organization in Canada. "

[22] At this stage, the ability of the Petitioner to act as a representative for the members of the proposed group in the Motion is not in question.⁸

FOR THESE REASONS, THE COURT:

⁸ Carpentier v. Apple Canada inc., EYB 2007-118763 (C.S.) at para. 20 and Syndicat général des professeures et professeurs de l'Université de Montréal v. Gourdeau, EYB 2006 108193 at para. 53-85.

[23] **GRANTS** the authorization to obtain the information in relation to paragraphs 4n), 4o) and 7e) of the Motion for Authorization and **ORDERS** such information to be provided by affidavit of the Petitioner including the supporting documents, within ten (10) days of this judgment;

[24] If the affidavit and the supporting documents are deemed insufficient by the Respondents or are not submitted, **AUTHORIZES** the Respondents to take a motion before this Court to seek further and better information in relation to paragraphs 4n), 4o) and 7e) of the Motion for Authorization within ten (10) days of the reception of the said affidavit;

[25] **DISMISSES** the Respondents' requests to examine on all the other topics suggested for the examination of the Petitioner;

[26] THE WHOLE WITH COSTS:

Yves Poirier, J.S.C.

Me Jeffrey Orenstein
JEFFREY ORENSTEIN AVOCAT
Attorney for the Petitioner

Me Julia Mercier
BORDEN LADNER GARVAIS
Attorney for the Respondents

Date of hearing: October 5, 2010