

CANADA / JUDGMENT

Kett v. Kobe Steel, Ltd.

2020 BCSC 1977

COURT

Supreme Court of British Columbia

DECIDED

14 December 2020

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2020 BCSC 1977 Kett v. Kobe Steel, Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kett v. Kobe Steel, Ltd.,

2020 BCSC 1977

Date: 20201214

Docket: S1710805

Registry: Vancouver

Between:

Ryan Kett, Erik Oun, and Jim Wong

Plaintiffs

And

Kobe Steel, Ltd., Shinko Aluminum Wire Co., Ltd., Shinko Wire Stainless Company, Ltd., and
Nippon Koshuha Steel Co., Ltd.

Defendants

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

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

Counsel for the Plaintiffs:

D. Klein

M. Good

C. Hannouche

Counsel for the Defendants:

J. M. Sullivan, Q.C.

R. L. Reinertson

J. A. Hutchinson

Place and Date of Hearing:

Vancouver, B.C.

November 20, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 14, 2020

Overview

- [1] This is an application for settlement approval, as well as approval of class counsel fees in a proposed class action proceeding under the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA].
- [2] The proposed class action was brought against Kobe Steel Ltd., and various of its subsidiaries and related companies, on November 21, 2017.
- [3] The representative plaintiffs, Ryan Kett, Erik Oun, and Jim Wong, allege that the defendants, between as early as 1977 and continuing until 2017, fraudulently misrepresented to major automobile manufacturers that their metal products met technical and material standards and specifications when, in fact, they did not. The plaintiffs further allege that the metal products and parts were priced on the basis that they met the standards and specifications. The plaintiffs, the indirect and ultimate purchasers, allege that the overcharges were passed on to them. The plaintiffs seek to hold the defendants accountable for this unlawful conduct. The defendants deny the allegations.
- [4] Parallel actions were filed in Ontario and Quebec. Those actions are being managed cooperatively.
- [5] A settlement was reached on June 7, 2019 (the "Settlement Agreement") as a result of a successful mediation. The representative plaintiffs have approved the terms of the Settlement Agreement and class counsel fees.
- [6] For the reasons that follow, I approve the Settlement Agreement with the exception of the class counsel fees. I reduce the fees to 28% of the amount awarded to the class in the Settlement Agreement.

Background

- [7] The following defendant companies are incorporated under the laws of Japan:
- a) Kobe Steel Ltd. ("Kobe Steel"), a publicly traded company, is primarily engaged in the manufacture and sale of a variety of metal products;
 - b) Shinko Aluminum Wire Co. Ltd., a subsidiary of Kobe Steel, is primarily engaged in the manufacture and sale of aluminum wires and bars;
 - c) Shinko Wire Stainless Company Ltd., a wholly owned subsidiary of Shinko Wire Company Ltd., is primarily engaged in the manufacture and sale of stainless steel, titanium, titanium alloy, and special alloy wires, as well as stainless steel scrub brushes. Kobe Steel owns shares representing an approximately 43% interest in Shinko Wire Company Ltd; and
 - d) Nippon Koshuha Steel Co. Ltd., a publicly traded company, is primarily engaged in the manufacture and sale of special steel and alloy products. This includes wire rods, bars, plates, forgings, process products, and cold pressed steel products. Kobe Steel owns shares representing an approximately 52% interest in Nippon Koshuha Steel Company Ltd.
- [8] In their notice of civil claim filed November 21, 2017, the representative plaintiffs allege that on October 8, 2017, Kobe Steel announced that testing data for some metal products had been improperly recorded, rewritten, or created, such that some of their metal products were marketed as meeting the applicable specifications regardless of whether those metal products had in fact met the specifications.
- [9] On September 28, 2018, the representative plaintiffs filed a notice of application seeking to have their actions certified as a class proceeding and themselves appointed as representative plaintiffs. Each plaintiff purchased or leased a vehicle that allegedly contained the deficient metal products. The plaintiffs allege that the defendants were unjustly enriched by their conduct and caused them loss and damage.
- [10] In support of their application, the plaintiffs delivered expert reports from three subject matter experts: Dr. Douglas Allen (economist); Dr. Dmitry Sediako (metallurgy engineer); and Mr. Steve Rodgers (autoparts industry expert). In addition, the plaintiffs delivered three affidavits from the representative plaintiffs, and a lengthy legal assistant affidavit including hundreds of pages of documents obtained from the defendants' records and various public sources.
- [11] By court direction, on February 26, 2019 the defendants filed a response to civil claim. The defendants denied liability. The defendants' responding certification materials were delivered on March 29, 2019. The defendants attached ten affidavits contesting certification, including three subject matter experts: Dr. Mark Israel (economist); Dr. Michael Stevenson, (metallurgical engineer); and Mr. Dennis DesRosiers (autoparts industry expert).

- [12] On April 30, 2019, the plaintiffs delivered responding expert reports from each of their experts, as well as additional evidence.
- [13] There was a dispute regarding the cross-examination of experts and a hearing was held on May 21, 2019. Before I issued a decision, the parties advised me that they had reached a settlement in mediation on June 7, 2019.
- [14] On December 5, 2019, I made an order certifying this action, by consent, for settlement purposes. The national class includes: "All persons in Canada (excluding Quebec) who (1) purchased or leased a new or used vehicle manufactured by Toyota (including Lexus), Honda (including Acura), Subaru, Mazda, Mitsubishi, Nissan (including Infiniti), Kia, Hyundai, Tesla or GM, or (2) purchased parts or replacement parts containing automotive metal manufactured by the Defendants, between 2002 and 2018."
- [15] On April 23, 2020, Justice Lussier in Quebec made a parallel order. He directed that notice and the settlement approval hearing be delayed until court operations resumed their normal function. I made a further order on May 4, 2020 suspending the publication of notice until normal court operations resumed in BC and Quebec.
- [16] On September 17, 2020, after relatively normal court operations resumed, I ordered the publication of notice to begin and that a date be set for the settlement approval and fee approval hearing. The hearing was subsequently scheduled for November 20, 2020.
- [17] At the time of the hearing on November 20, 2020, no class member had opted out of or objected to the settlement.

Key Terms of Settlement Agreement

- [18] The following is a brief summary of the Settlement Agreement. The full Settlement Agreement, as well as the notices, are available on the website of Klein Lawyers LLP: <https://www.callkleinlawyers.com/class-actions/current/kobe-steel-limited/>.
- [19] Under the Settlement Agreement, Kobe Steel has agreed to pay a settlement amount of \$1,950,000 to resolve the litigation, without an admission of liability. The parties have proposed that the settlement amount, after deduction for class counsel fees, disbursements, and applicable taxes (including costs of notice), and any payments to representative plaintiffs, be distributed by way of cy-près donation. The charities chosen are the Law Foundation of British Columbia (77.4%) and Éducaloi in Quebec (22.6%).
- [20] The settlement funds have been held in trust by counsel for the defendants since June 2019. As of October 13, 2020 the amount of the settlement funds with accrued interest was \$1,987,412.28.

- [21] The Settlement Agreement is subject to approval in each of BC and Quebec. If this Court grants the orders sought, the same approvals will be sought in Quebec. The Settlement Agreement is also subject to a recognition and enforcement order in Ontario. The Settlement Agreement sets out an abbreviated procedure for the Ontario process.
- [22] Upon entry of the last order in either Quebec or Ontario, the Settlement Agreement will become final. Within ten days of that Settlement Agreement becoming final, the settlement funds will be paid to class counsel in trust for distribution in accordance with the Settlement Agreement.

Parties' Positions

- [23] Counsel for the plaintiffs argue that this is complex litigation with a myriad of possible defences available to the defendants. There is a risk that the plaintiffs would not be successful at certification or at the common issues trial. The primary issue at trial would be whether any overcharges were passed down to the class of automobile purchasers through the supply chain, which will be difficult to prove.
- [24] Even if successful at trial, the plaintiffs face the prospect of lengthy appeals and challenging prospects of recovery against non-resident defendants.
- [25] The defendants agree that this class action is fraught with risks. As they set out in their application response, the defendants take the position that a few key facts pose an insurmountable obstacle to the action at certification or, if successful at that level, on its merits. These obstacles are the following:
- (a) only certain metal products manufactured by the Defendants were affected by the conduct at issue in this litigation;
 - (b) only portions of those particular metal products were affected by that conduct (often very small portions--e.g., 1.62% of the bearing steel supplied by Nippon Koshuha Steel Co., Ltd., and 0.19% of the steel bars supplied by Shinko Aluminum Wire Co., Ltd. to a manufacturer of automotive and electronic parts);
 - (c) some of the metal products were affected such that their quality exceeded purchaser specifications (e.g., the steel powder supplied by Kobe Steel, Ltd. was denser than called for by customer specifications);
 - (d) only some of the affected metal products were used to make auto parts and components; and
 - (e) those auto parts and components may have been used in Canada for different vehicle makes and models at different times, and which ones would often be unknown to the Defendants given the nature of the supply chain (e.g., the Defendants frequently supplied their metal products to manufacturers of automotive parts and components, rather than to manufacturers of vehicles).

Legal Principles

- [26] Section 35(1) of the CPA provides that a class proceeding may be settled only with the approval of the court. Once approved, the settlement "binds every class member who has not opted out of or been excluded from the class proceeding, but only to the extent provided by the court": CPA, s. 35(4).
- [27] The CPA does not set out the test for settlement approval. However, the jurisprudence directs courts to examine whether the settlement is "fair and reasonable and in the best interests of the class as a whole": *Cardozo v. Becton, Dickinson and Company*, 2005 BCSC 1612 at para. 16. A class action settlement is not required to be perfect; rather, the settlement must "fall within a range or zone of reasonableness to be approved": *Bodnar v. The Cash Store Inc.*, 2010 BCSC 145 at para. 17.
- [28] Public policy favours the settlement of complex disputes. There is a strong presumption of fairness where a settlement has been negotiated at arm's length. This is because experienced class counsel is in a unique position to assess the risks and rewards of the litigation and their recommendation is given considerable weight by the reviewing court: *Jones v. Zimmer GMBH*, 2016 BCSC 1847 at para. 36.
- [29] Canadian courts have identified ten factors to consider when assessing the reasonableness of a settlement (*Jones* at paras. 42 and 47; *Cardozo* at para. 17):
1. the likelihood of recovery, or the likelihood of success;
 2. the amount and nature of discovery evidence;
 3. settlement terms and conditions;
 4. recommendations and experience of counsel;
 5. future expense and likely duration of litigation;
 6. recommendations of neutral parties, if any;
 7. number of objectors and nature of objections;
 8. presence of good faith and absence of collusion;
 9. degree and nature of communications by counsel and the representative plaintiffs with class members during litigation;
 10. information conveying to the court the dynamics of and the positions taken by the parties during the negotiation.

Analysis

Approval of Settlement Agreement

- [30] The question before me is whether the proposed settlement is fair and reasonable and in the best interests of the class. The approval of the settlement is not contingent on the court's approval of the fees: CPA, s. 38.
- [31] The action alleges that the defendants fraudulently misrepresented to major automobile manufacturers that their metal products met technical and materials standards. At the outset, the plaintiff indicated to me that they had a strong case. However, at this hearing they conceded the case has significant risks.
- [32] The major difficulty, as I understand it, is that certification and liability would turn on what constitutes a breach of the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2 [BPCPA] and whether any losses could be traced through multi-layered global supply chains, in the context of modern automotive manufacturing. Because they were indirect purchasers, it would be daunting to establish the pass-through of the overcharges to the class members. The expert economists confirmed there was virtually no way to trace the product to any individual vehicles. In addition, there was little to no evidence establishing there were safety or performance issues. Finally, the defendants' expert challenged the plaintiff's lack of a credible methodology with respect to loss.
- [33] I accept there were strong and significant reasons to settle this claim. This finding is bolstered by the recent decision of Justice Branch in *Kett v. Mitsubishi Materials Corporation*, 2020 BCSC 1879, a similar case to the one before me. That case also involved Japanese auto parts suppliers who were alleged to have overcharged manufacturers for substandard product because of their failure to carry out proper parts testing. Justice Branch, describing the class action as "too large and too fragmented", ultimately refused certification because the plaintiff's action failed to meet the requirements of s. 4(1) of the CPA. The evidence showed that the evaluation of both liability and damages would require a prohibitive "shipment-by-shipment" analysis to show which products had been overcharged or not: at para. 172. Justice Branch also found the plaintiff's claim under the BPCPA did not disclose a cause of action as the defendants could not be considered suppliers in a "consumer transaction" as defined in s. 1 (with the exception of direct part purchases): at paras. 81-82.
- [34] A class action settlement is not required to be perfect. However, the settlement must "fall within a range or zone of reasonableness to be approved": *Bodnar* at para. 17.
- [35] A primary consideration for me is how the parties determined the value of the claim. In terms of how the parties came to the settlement sum of \$1,950,000, the plaintiffs state:

Using expert evidence from Messrs. Steve Rodgers and Dennis DesRosiers, and pulling data from publicly-available sources, and matching that information against the defendants' affidavit evidence and public disclosure regarding the underlying facts, the plaintiffs compiled a list of likely affected vehicle makes and models in Canada during the class period 2002-2018. In the plaintiffs' estimation, the maximum number of affected makes and models was 2,531,171. Although the fact of the wrongdoing was never seriously in doubt, the evidence from the defendants was that not every vehicle in a particular model or time period would have been affected, so a discount factor for that reality is reasonable. In these circumstances, the settlement amount of \$1,950,000 is congruent with the approximate maximum number of vehicles that may have been affected by the alleged wrongdoing, with a discount of close to 25% for uncertainty about whether each and every car was directly affected.

In cases that involve cartel-like price effects (i.e. an impact at one part of the supply chain that is then passed through further levels to the ultimate consumer), one way of valuing losses is to use a nominal figure multiplied by the total number of affected customers or products. Here, the maximum number of affected vehicles was 2,531,171. Applying a discount factor of close to 25% to reflect the reality that not every vehicle would have been directly impacted, the settlement figure of \$1,950,000 can be interpreted as valuing each claim at \$1.00. That is not out of line with the economic evidence of the experts Drs. Allen and Israel, which indicated that price effects for individual consumers could be small, especially when the impacts of pass-through were considered.

- [36] I accept that the parties arrived at the settlement sum through a fair and reasonable process. As already stated, there is a strong presumption of fairness where a settlement is negotiated at arm's length. Courts have held that experienced class counsel are in a unique position to assess the risks and rewards of the litigation. Their recommendation is given considerable weight by the reviewing court: Jones at para. 36.
- [37] Klein Lawyers LLP and Mathew P Good Law Corporation are experienced in the specialised area of class action litigation. They have weighed the risks and benefits of continued litigation against the certainty of timely recovery established in the proposed Settlement Agreement. Their assessment is to be given significant weight and is germane to the settlement approval hearing.
- [38] In addition to the uncertainties described above, the ultimate amount of compensation per individual class member anticipated after a full trial would be very low.
- [39] The settlement is structured on a lump sum basis and will be distributed, after class fees, disbursements, and honouraria, by way of cy-près. The precedent for cy-près distribution is well established and is contemplated by s. 34(1) of the CPA as it existed at the time the present action was commenced: Sun-Rype Products Ltd. v. Archer Daniels Midland Co., 2013 SCC 58 at para. 25. Cy-près is appropriate where, as here, the pass-through to the indirect purchasers would be difficult to establish and the individual claim is modest. The calculated amount would be approximately \$1 per class member. At this small amount per class

member, the cost of administration of a class member distribution could easily exceed the amount to be distributed.

[40] I agree with the parties that the BC Law Foundation and Éducaloi in Quebec are appropriate recipients of the donation. The plaintiffs advised me that while they considered more targeted charities, they did not find a suitable one within, or associated with, the automobile supply industry.

[41] In BC, the Law Foundation is a non-profit foundation that promotes access to justice in the province. The Law Foundation's statutorily mandated areas are: legal education, legal research, legal aid, law reform, and law libraries. Recently the CPA was amended to provide that 50% of all cy-près awards are to be directed to the Law Foundation of BC. I note there are separate rules under the amended CPA where losses were suffered primarily by Indigenous peoples. Sections 36.1 and 36.2 of the CPA, as amended, state as follows:

Definition

36.1 In this Division, "Law Foundation of British Columbia" means the Law Foundation of British Columbia continued under section 58 (1) of the Legal Profession Act.

Undistributed amounts

36.2 (1) Subject to subsection (2), the court must order that, if all or any part of an award under Division 2 or settlement funds under section 35 have not been distributed within a time set by the court,

- (a) 50% of the undistributed amount be distributed to the Law Foundation of British Columbia, and
- (b) 50% of the undistributed amount be applied in any manner that may reasonably be expected to benefit class or subclass members, including, if appropriate, distribution to the Law Foundation of British Columbia.

[42] This amendment applies to all actions commenced after the amendment came into force on November 27, 2018. While these new provisions do not apply to the case at bar, they highlight that the Law Foundation of BC is a worthy recipient of the donation. According to the affidavit of Geoffrey White, Chair of the Board of Governors of the Law Foundation of BC, the Law Foundation of BC has experience with cy-près awards and they have "emerged as a key source of supplemental income for the Law Foundation of BC."

[43] There are no objections to the Settlement Agreement and no class members have opted out.

- [44] Based on the defences available to the defendants, the case faces legal and factual hurdles. The option of proceeding to trial has significant risks. To succeed, the plaintiffs would have to establish a breach of the BPCPA based on an indirect pass-through to the class members. As the auto parts and components were used in numerous vehicle makes and models, this would be a daunting task. Even if successful, an appeal of the judgment would likely occur at the certification and trial stages.
- [45] While the settlement is not large, in the context of these obstacles I have no reason to question the number. It is within a range or zone of reasonableness.
- [46] I am persuaded the Settlement Agreement meets the test, as established in the jurisprudence, of a fair and reasonable agreement that is in the best interests of the class. It is approved.

Class Counsel Fees and Disbursements

- [47] In addition to approving the Settlement Agreement, I must determine whether to approve the fees and disbursements, including honouraria. If I do not approve the fees, I may set the fees and disbursements: CPA, s. 38.
- [48] The retainer agreement signed by Mr. Kett, Mr. Oun, and Mr. Wong provide for a contingency fee of 33.33% of the amount awarded to the class in the Settlement Agreement, plus disbursements, interest on disbursements, and applicable taxes. The contingency fee does not include a graduated percentage, depending upon the stage at which a settlement is reached or the matter is otherwise resolved.
- [49] I should only reduce this fee if I have a principled reason: Bodnar at paras. 25-26.
- [50] The plaintiffs argue that they have successfully navigated this case through several years of intensive litigation and settlement negotiations. They have devoted considerable monetary and internal resources in prosecuting the actions. They argue it was extremely complicated litigation including:
- the procedural complexity of class actions;
 - substantive legal complexity given the nature of the litigation and causes of action against a series of interrelated defendants; and
 - challenges due to the multi-layered nature of the global automotive sector.
- [51] Counsel advised me that they put significant hours into the action, approximately 173 hours in each firm.
- [52] In approving class fees, the court recognizes the meritorious efforts of counsel and the risks they undertake: Pro-Sys Consultants Ltd. v. Infineon Technologies AG, 2014 BCSC 1936 at para. 54; White v. Attorney General of Canada, 2006 BCSC 561 at para. 31.

[53] As articulated in *Green v. Tecumseh Products of Canada Limited*, 2016 BCSC 217 at para. 57, the factors considered in assessing whether class counsel fees are fair and reasonable include the following:

- (i) the degree of risk undertaken by counsel;
- (ii) the degree of risk in the proceeding;
- (iii) the time expended by the solicitor;
- (iv) the legal complexity of the matters to be dealt with;
- (v) the degree of responsibility assumed by the solicitor;
- (vi) the monetary value of the matters in issue;
- (vii) the importance of the matter to the client;
- (viii) the degree of skill and competence demonstrated by the solicitor;
- (ix) the results achieved; and
- (x) the ability of the client to pay and the client's expectations as to the amount of the fee.

[54] It is not unusual for counsel to have a contingency fee of 33.33% approved. However, this amount is at the high end of the generally accepted range of court approved fees. The typical range for contingency fees is 15% to 33% of the award or settlement: *Cardoso v. Canada Dry Mott's Inc.*, 2020 BCSC 1569 at para. 35. Lower fees may not provide the proper incentives for counsel to litigate risky class actions in the future; higher fees may incentivize counsel to settle at earlier stages of the proceeding which may not be in the best interest of the class.

[55] I appreciate that there were no objections from class members in this case and none opted out of the settlement. I also appreciate that the litigation was complicated and counsel expended a considerable amount of time and resources toward prosecuting it. This included a number of appearances and procedural steps in the litigation, as well as obtaining expert reports. However, the matter settled at a relatively early stage, prior to certification. Preparation for trial was in its infancy. This was not protracted litigation.

[56] The honouraria provided to the representative plaintiffs appears to reflect the fact that this litigation was settled in the early stages of the proceeding. The range of honouraria is typically in the range of \$3,000-\$4,000: *Cardoso* at para 47. The plaintiffs have appropriately requested that I approve \$2,500 to each representative plaintiff to recognize their contributions to the successful result.

- [57] As stated above, a consideration in approving fees is to encourage class counsel to pursue difficult and risky litigation. I was advised that class counsel incurred added financial risk by not seeking third-party litigation financing. However, in BC such funding is not as important as in other jurisdictions because BC is a no cost jurisdiction. The risks to counsel, at the early stages, is not as significant.
- [58] The integrity of the profession is a consideration when approving legal fees in the class action context: *Plimmer v. Google, Inc.*, 2013 BCSC 681; *Endean v. The Canadian Red Cross Society*, 2000 BCSC 971, *aff'd* 2000 BCCA 638, leave to appeal dismissed, [2001] S.C.C.A. No. 27. Counsel often receive a handsome reward for undertaking the above-stated risks. This can create the perception that the ultimate beneficiaries are class counsel, rather than the class. As articulated by Justice Myers in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2018 BCSC 2091 at para. 53, "the court should ensure that counsel have not commenced an action that uses the class action legislation and judicial system to obtain a result in which they are the only or major beneficiaries." As Justice Douglas recently stated: "The ultimate purpose of the class action vehicle is to benefit the class, not their lawyers. The payment to the lawyers is simply a way to achieve the benefits for the class, not the other way around": *Cardoso* at para. 37.
- [59] Fees must not appear to the public that the litigation solely benefits counsel. Where, as here, the settlement amount is modest, the individual class members are not compensated, and the administrative costs are low, there could be such a perception.
- [60] In these circumstances, I find the fee to be disproportionate to the amount of effort, risk, and resources involved. I reduce class counsel fees to 28%.
- [61] I approve the disbursements, including the honouraria to the representative plaintiffs.

Disposition

- [62] I approve the Settlement Agreement.
- [63] I reduce class counsel fees to 28% of the amount awarded to the class in the Settlement Agreement, payable to class counsel as a first charge on the settlement funds.
- [64] The disbursements of \$76,000.89, and further disbursements of up to \$1,000, are approved and payable to class counsel as a first charge on the settlement funds.
- [65] Honouraria of \$2,500 are approved and awarded to each of Ryan Kett, Erik Oun, and James Wong, payable as a first charge on the settlement funds.
- [66] I leave it to the parties to calculate the applicable interest and taxes.
- [67] This Order is contingent on a fee approval order being made by the Quebec Superior Court, and a recognition and enforcement order from the Ontario Superior Court, and the terms of this Order shall not be effective unless and until such orders are made by those courts.

"D. MacDonald J."

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