

CANADA / JUDGMENT

Pro-Sys Consultants Ltd. v. Infineon Technologies AG

2011 BCSC 1447

COURT

Supreme Court of British Columbia

DECIDED

27 October 2011

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2011 BCSC 1447 Pro-Sys Consultants Ltd. v. Infineon Technologies AG IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Pro-Sys Consultants Ltd. v. Infineon Technologies AG, 2011 BCSC 1447 Date: 20111027 Docket: L043141 Registry: Vancouver Between: Pro-Sys Consultants Ltd. Plaintiff And: Infineon Technologies AG, Infineon Technologies North America Corp., Hynix Semiconductor Inc., Hynix Semiconductor America Inc., Hynix Semiconductor Manufacturing America, Inc., Samsung Electronics Co. Ltd., Samsung Semiconductor, Inc., Samsung Electronics America, Inc., Samsung Electronics Canada Inc., Micron Technology, Inc. and Micron Semiconductor Products, Inc. doing business as Crucial Technologies, Elpida Memory, Inc. and Elpida Memory (USA) Inc. Defendants Corrected Judgment: The text of the judgment was corrected at paragraph 13 on November 15, 2011 Before: The Honourable Mr. Justice D.M. Masuhara

Ruling

Counsel for the Plaintiff: J.J. Camp Q.C., R. Mogerman, and J.R. Facchin Counsel for the Defendant, Infineon: K. Kay Counsel for the Defendant, Hynix: W.B. Milman, and M. Feder Counsel for the Defendant, Samsung: D. Neave, and R. Kwinter Counsel for the Defendant, Micron: D. Kent Counsel for the Defendant, Elpida: G. Grove Place and Date of Hearing: Vancouver, B.C. October 20, 2011 Place and Date of Judgment: Vancouver, B.C. October 27, 2011

Introduction

[1] A case planning conference was held on October 20, 2011. I was updated on various matters and also received submissions on certain issues arising from my Ruling of August 19, 2011, indexed at 2011 BCSC 1128. My determinations of the issues are what follow.

(a) Privileged Documents

[2] The plaintiff refers to my direction contained in para. 49 of my Ruling requiring the defendants to properly list and describe the documents over which they assert privilege. The defendants do not wish to list and describe their privileged documents at this time relying

on the "pause" which I directed in my Ruling. The "pause" was directed pending further clarity as to the status of the Microsoft and Sun-Rype cases and their impact on this action. The defendants say that para. 50 specifies the steps to be taken during the "pause" and that my direction relating to documents over which privilege is asserted is not contained in para. 50, and thus they should not be required to do so.

- [3] The defendants are correct, para. 50 does not refer to the requirement to list and describe documents over which privilege is asserted; however, part of the objective of my Ruling was to provide for upgrading of the documents lists of the defendants to a higher level of workable utility during the "pause". This would include the listing of privileged documents. Accordingly, the term proposed by plaintiff's counsel on this point is approved.
- (b) Assurance Measures taken by Defendants' Counsel
- [4] Much of the document production for this case is reliant upon the work of counsel involved in the criminal and civil suits in the United States, which this action is related to. In my Ruling at para. 47, I stated that: it is not clear to what extent counsel having conduct of this case have exercised their oversight to the production made. As a result, defence counsel are directed to provide a detailed description of their own assurance measures taken, such as instructions given to those relied upon, oversight employed, reviews of relied upon counsel's methods and verification methods, used, to ensure that the rules of this Court have been properly communicated and applied in the disclosure relied upon.
- [5] Counsel for the plaintiff says that the required assurance needs to be in affidavit form because of concerns regarding the level of vigour applied by defence counsel in carrying out their obligations under the Supreme Court Civil Rules.
- [6] Defence counsel are aware of their obligations as officers of this Court with respect to the vital aspect of proper disclosure in the administration of justice. The assurance required does not need to be in affidavit form at this point.
- (c) Whether steps following the "pause" should be set out
- [7] The plaintiff seeks to set out steps with respect to document production following the "pause". It is clear that plaintiff's counsel put the defendants on notice of the many things it requires to be disclosed. My Ruling states that strict time limits for disclosure will be selected once the need for the "pause" is removed. There will no doubt be another case planning conference with further developments in the Microsoft and Sun-Rype cases. It will be then when specific requirements can be addressed. It is not necessary to set out steps following the "pause" at this time.
- (d) Production of certain documents referred to in the Summary of Commission Decision of 19 May 2010 (Case COMP/38.511 -DRAMs), European Commission

- [8] The plaintiff provided a copy of the Summary of Decision, which indicates that certain decisions of the Commission were made on May 19, 2010, but released only in June 2011. The Summary states, among other things that the formal settlement submissions of various parties (including the defendants herein) were made in December 2009. More specifically, it states: they all introduced formal settlement submissions in which they clearly and unequivocally acknowledged their respective liability for the infringement. A Statement of Objections reflecting the parties' submissions was notified to them on 8 February this year and the parties all confirmed that its content reflected their submissions and they remained interested in the settlement procedure. The Advisory Committee on Restrictive Practices and Dominant Positions issued a favourable opinion on 7 May 2010 and the Commission adopted the Decision on 19 May 2010.
- [9] The Summary also sets out the specific periods during which various industry players, Micron, Infineon, Hynix, Samsung, NEC Electronics, Hitachi, Mitsubishi, Toshiba, Elpida and Nanya: entered into a scheme and/or network of contacts and secret information sharing by which they coordinated their conduct on general pricing levels and quotations to major PC/server Original Equipment Manufacturers ("OEMs"), ultimately amounting to price coordination vis-a-vis such clients. This was done with the aim of restricting competition in respect of major PC/server OEMs with regard to the sale of Dynamic Random Access Memory...and also for the sale of Rambus DRAMs (only Toshiba, Samsung and Elpida), from 1 July 1998 until 15 June 2002 in respect of DRAMs and from 9 April 2001 until 15 June 2002 in respect of Rambus DRAMs.
- [10] The Summary goes on to set out the significant fines imposed against all of the above named, except Micron who was not assessed a fine.
- [11] The plaintiff points out that at paras. 28 and 40 of my Ruling I note that the defendants indicated that they produced documents that were provided to competition regulators concerning price-fixing, including the European Commission. The plaintiff says that it reviewed the lists of documents provided and determined that the defendants did not produce the formal settlement submissions and related documents referred to in the Summary of Commission Decision. The plaintiff has requested these documents and the defendants do not wish to do so.
- [12] The defendants seem to argue three points. First, that the documents that are referred to in my Ruling were produced. Second, that an application for leave is required during the "pause" if the plaintiff seeks document production. Third, that the documents may be potentially confidential.
- [13] I conclude that an application is not required. The defence indicated that all documents were produced. Apparently, this was not case. It may be that counsel did not believe what was requested included what is referenced in the Summary of Commission Decision. In my view, these documents should be produced. If the documents sought are covered by some form of confidentiality which this Court should recognize, then the defendants must

properly establish this. The defendants will have 30 days, unless the parties can agree to another period, to provide the necessary materials establishing confidentiality. The parties may set the matter down for hearing if need be, regardless of the "pause". In the absence of the defendants providing evidence of confidentiality then the requested documents are to be produced within 15 days, regardless of the "pause".

(e) Subpoenaing witnesses

[14] On September 29, 2011, plaintiff's counsel sent a list of potential witnesses to each defendant with a request that they advise if each named person continues to be employed by them or otherwise under their control. As I understand it, counsel for the defendants now agreed to provide the requested information. Accordingly, there will be an order to that effect. "The Honourable Mr. Justice Masuhara"

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Prepared on 29 October 2026 · Esheria