COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-029630-217
(500-06-000923-181)

MINUTES OF HEARING

DATE: January 27, 2023

CORAM: THE HONOURABLE FRANÇOIS DOYON, J.A.
GENEVIÈVE COTNAM, J.A.
BENOÎT MOORE, J.A.

APPELLANT	COUNSEL
GAY HAZAN	Mtre DAVID ASSOR Mtre SARAH RASEMONT (*Lex Group*) Absent
RESPONDENTS	COUNSEL
MICRON TECHNOLOGY, INC. **MICRON SEMICONDUCTOR PRODUCTS, INC.**	Mtre SIDNEY ELBAZ Mtre SIMON PARANSKY *(McMillan)* Absent

SAMSUNG ELECTRONICS CO. LTD. **SAMSUNG SEMICONDUCTOR INC.** **SAMSUNG ELECTRONICS CANADA INC.**	Mtre KARINE CHÊNEVERT Mtre JASMINE KAVADIAS LANDRY *(Borden Ladner Gervais)* Absent
SK HYNIX INC., formerly known as HYNIX SEMICONDUCTOR INC. **SK HYNIX AMERICA, INC., formerly known as HYNIX SEMICONDUCTOR AMERICA INC.**	Mtre NICHOLAS RODRIGO Mtre FAIZ MUNIR LALANI *(Davies Ward Phillips & Vineberg)* Absent

On appeal from a judgment rendered on June 28, 2021, by the Honourable Donald Bisson of the Superior Court, District of Montreal.

NATURE OF THE APPEAL: **Class Action - Authorization – The DRAM price – Extracontractual Civil liability – Absence of fault or conspiracy – *Competition Act* – Adequate representation of members.**

Clerk at the hearing: Annabelle M-Trudel	Courtroom: Antonio-Lamer

HEARING

Continuation of the hearing held on January 25, 2023. The parties were excused from appearing in Court.

BY THE COURT: Judgment – see page 4.

Annabelle M-Trudel, Clerk at the hearing

JUDGMENT

[1] The Appellant appeals from the judgment rendered on June 28, 2021, by the Honourable Mr. Justice Donald Bisson of the Superior Court, district of Montreal, dismissing with costs the Amended Application for Authorization to Institute a Class Action (the "Application").

[2] The Appellant sought the authorization to institute a national class action against the Respondents to claim the damages arising from their alleged price-fixing conspiracy restricting the production of dynamic random-access memory chips ("DRAM") between June 1, 2016 and February 1, 2018.

[3] According to the judge, the Appellant failed to demonstrate that the alleged facts justified the conclusions sought.[1]

[4] The appeal raises four issues. The first three overlap as the Appellant essentially argues that the judge erred when analyzing the criterion set out in article 575(2) *C.C.P.* Not only did he ask for proof of the existence of a price-fixing agreement between the Respondents at the authorization stage, but he focused his analysis on the merits of the case instead of performing a *prima facie* screening of the facts. The Appellant believes that the allegations of his Application and the supporting exhibits were more than sufficient to allow for the authorization of the class action. As for the fourth issue, the Appellant argues that the judge should have decided that the criterion under article 575(4) *C.C.P.* had been met.

[5] For the following reasons, the appeal must be dismissed.

[6] It is well established that the power of this Court to intervene in an appeal from a decision on an application for the authorization to institute a class action is limited and that "it must show deference to the motion judge's decision"[2] as the assessment of the criteria under article 575 *C.C.P.* falls within his discretion. The Court will intervene "only if the motion judge erred in law or if the judge's assessment with respect to the criteria of art. 575 *C.C.P.* is clearly wrong".[3]

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1 Art. 575(2) *C.C.P.*

2 *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, paragr. 34 [*Vivendi*].

3 *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, paragr. 10, citing *Vivendi*, *supra*, note 2, paragr. 34.

[7] Contrary to the Appellant's contention, the judge was well aware of his screening role, stating that "[l']exercice auquel le tribunal est convié en est un de filtrage dont l'objectif est de se satisfaire de l'existence d'une cause défendable."[4]

[8] He also stated:

> [17] Le Tribunal doit prêter une attention particulière, non seulement aux faits allégués mais aussi aux inférences ou présomptions de faits ou de droit qui sont susceptibles d'en découler et qui peuvent servir à établir l'existence d'une « cause défendable ». Cependant, le Tribunal doit élaguer le texte de la Demande modifiée des éléments qui relèvent de l'opinion, de l'argumentation juridique, des inférences ou hypothèses non vérifiées ou encore qui sont carrément contredits par une preuve documentaire fiable.
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> [18] Le Tribunal rappelle que, outre les allégations de fait contenues à la Demande modifiée et les pièces à son soutien, il doit aussi tenir compte de la preuve que les défenderesses ont été autorisées à produire pour évaluer l'opportunité d'autoriser l'action collective proposée, avec les limites selon lesquelles cette preuve ne doit pas être susceptible d'être contestée quant à sa véracité, sa portée ou sa force probante, et ne doit pas générer un débat contradictoire.[5]
>
> [Reference omitted]

[9] He then proceeded to examine the Application and concluded that, in and of themselves, the allegations are insufficient, even if taken at face value, to demonstrate an arguable case:

> [48] [...] les allégations suivantes sans aucun autre élément de preuve ne sont pas suffisantes en matière de complot et sont soit des allégations imprécises, vagues ou générales ou des hypothèses :
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> - Les parties défenderesses se sont entendues pour restreindre la concurrence ou ont participé à un complot pour restreindre la concurrence;
> - Le complot a gonflé artificiellement les prix d'un bien;
> - Les acheteurs directs et indirects ont payé trop cher le bien en raison de ce complot.

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4 Judgment under appeal, paragr. 15.
5 Judgment under appeal, paragr. 17-18.

> [49] Autrement dit, alléguer seulement ces éléments sans rien d'autre ne constitue pas une démonstration acceptable en matière de complot. Toute la jurisprudence québécoise récente est exactement au même effet. Toutes les autorités ont interprété l'arrêt *Infineon Technologies AG c. Options consommateurs* comme le fait ici le Tribunal. On voit même que des décisions antérieures de 2009 et de 2012 avaient la même interprétation.[6]
>
> [Reference omitted]

[10] Having said that, he then examined the supporting evidence since, as the Supreme Court stated in *Infineon*, "mere assertions are insufficient without some form of factual underpinning", thus requiring that general and imprecise allegations be "accompanied by some evidence to form an arguable case".[7]

[11] The Appellant has no personal knowledge of the facts. After explaining what DRAM is, how it is used in the industry and how it is manufactured, and after describing the Respondents' control over the market, he alleges that the DRAM industry is conducive to conspiracy and discusses the price variation of DRAM over the class period. He does not mention any elements that would suggest the existence of an agreement between the parties, but rather asserts that the conspiracy was effected "through statements to investors and the industry" and "public statements", without, however, referring to such statements. Those filed by the Respondents do not support such allegations. The Appellant relies on information gathered from various sources, including similar class actions filed in the United States, which have since been dismissed, citing graphs and data whose origin is unknown. Unlike other cases in which a conspiracy was alleged, the Respondents were not indicted, found guilty or fined for any contravention of competition laws. The Appellant only refers to an investigation which took place in China, but fails to elaborate on the nature and results of such investigation. The judge noted that some exhibits even contradict the allegations in the Application.

[12] After considering all these elements at face value, the judge mentioned that "[z]éro fois zéro donne zéro" and concluded as follows:

> [64] Bref, de l'avis du Tribunal, si on fait abstraction de ces éléments de preuve qui ne démontrent rien, il ne reste essentiellement rien dans la Demande d'autorisation pour démontrer la faute. Il reste seulement des allégations générales qui ne peuvent tenir sans preuve. Le demandeur n'a pas démontré d'entente entre les défenderesses pour restreindre la production de la DRAM.[8]

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6 Judgment under appeal, paragr. 48-49.
7 *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, paragr. 134 [*Infineon*].
8 Judgment under appeal, paragr. 64.

[13] In the absence of any evidence of such an agreement, the judge rightly concluded that the Appellant had failed to present an arguable case to support the claim that the Respondents are liable for compensatory or punitive damages to the members of the group under article 1457 *C.C.Q.*, under the *Competition Act* or even under the *Consumer Protection Act*.

[14] Although the judge's method, whereby he examined each allegation in light of the evidence adduced by the Appellant and used terms such as "démontre" or "absence de preuve", may lead to some confusion, it is obvious when considering the judgment as a whole that he did not engage in a merits-based analysis. He was simply seeking evidence to support the allegations. Exercising his discretion, he decided that multiple allegations had been made without any evidence at all having been adduced, that where evidence had been filed, it did not support the Appellant's allegations, or that some of the information contradicted the theory developed in the Application. In doing so, he followed the teachings in *Infineon*[9]:

> [134] On their own, these bare allegations would be insufficient to meet the threshold requirement of an arguable case. Although that threshold is a relatively low bar, mere assertions are insufficient without some form of factual underpinning. As we mentioned above, an applicant's allegations of fact are assumed to be true. But they must be accompanied by some evidence to form an arguable case. [...]

[15] This appeal, under the cover of a question of law, is an attempt by the Appellant to ask the Court to challenge the trial judge's findings under article 575(2) *C.C.P.* The Appellant has failed to identify any error warranting the Court's intervention.

[16] As mentioned above, the Appellant's Application contains general information about the Respondents, the use of DRAM, the DRAM manufacturing process and the market for DRAM. It states, with no supporting evidence, that the DRAM industry is conducive to conspiracy and discusses the price variation of DRAM over the class period. However, to establish that he had an arguable case, the Appellant needed to allege elements supporting the existence of a fault committed by the Respondents — namely, as the Appellant argues, the existence of an agreement between the Respondents to restrict the supply of DRAM or to fix prices.

[17] The Appellant also argues that the judge should have allowed the filing of an "expert report" prepared by Dr. Hal J. Singer in a similar case filed before the Federal Court. In a judgment rendered on March 15, 2021, the trial judge had refused to allow the production of said report. The Appellant did not appeal that decision. During the hearing on the Application, the Appellant made another attempt to file said report and the judge once again denied the request. The Appellant, similarly, did not seek leave to appeal that decision. He is now asking permission to file the report in the Court record.

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[9] *Infineon*, *supra*, note 7, paragr. 134.

This cannot be allowed. Even if the appeal had been properly filed, the Appellant has failed to show any reviewable error. Furthermore, the Respondents had specifically expressed their intention to file additional documents in response to this report.

[18] Lastly, under the circumstances, the ground of appeal concerning the criterion under article 575(4) *C.P.P.* is moot.

FOR THESE REASONS, THE COURT:

[19] **DENIES** the *de bene esse* application for permission to file the April 19, 2019 report by Dr. Hal J. Singer (Exhibit R-12);

[20] **DISMISSES** the appeal with costs.

FRANÇOIS DOYON, J.A.

GENEVIÈVE COTNAM, J.A.

BENOÎT MOORE, J.A.