Federal Court  Cour fédérale

Date: 20190326

Docket: T-809-18

Citation: 2019 FC 373

Ottawa, Ontario, March 26, 2019

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

CHELSEA JENSEN AND LAURENT ABESDRIS

Plaintiffs

and

SAMSUNG ELECTRONICS CO. LTD., SAMSUNG SEMICONDUCTOR INC., SAMSUNG ELECTRONICS CANADA, INC., SK HYNIX INC., SK HYNIS AMERICA, INC., MICRON TECHNOLOGY, INC., AND MICRON SEMICONDUCTOR PRODUCTS, INC.

Defendants

ORDER AND REASONS

[1] The Defendants collectively seek an order from this Court temporarily suspending this proposed competition class action pending the release by the Supreme Court of Canada [SCC] of its judgment in *Toshiba Corporation v Godfrey*, SCC File No. 37810 and *Pioneer Corporation v*

Godfrey, SCC File No. 37809 [together, *Godfrey*]. *Godfrey* was heard by the SCC on December 11, 2018 and is under reserve.

[2] The Plaintiffs' proposed class action alleges that the Defendants conspired to increase the price of a type of computer memory chip called dynamic random-access memory, more commonly known as "DRAM". According to the Plaintiffs, DRAM is used in various consumer electronic products such as personal computers and mobile phones, as well as in industrial products such as automotive and military devices. In their action, the Plaintiffs submit that the Defendants' participation in the alleged conspiracy caused class members to suffer loss and damage, and they assert claims under section 36 of the *Competition Act*, RSC 1985, c C-34 [Act] for purported breaches of the conspiracy provisions of the Act (sections 45 and 46). They seek some $500 million in damages on behalf of a national class composed of all persons in Canada who purchased DRAM or products containing DRAM between June 1, 2016 and February 1, 2018. The proposed class thus includes both direct and indirect DRAM purchasers.

[3] The *Godfrey* matter relates to an appeal from a certification decision in a comparable competition law class action filed in British Columbia and involving an alleged global price-fixing conspiracy concerning optical disc drives. The proposed class in that case also contains both direct and indirect purchasers, as well as so-called "umbrella" purchasers, namely persons who purchased the cartelized product at issue in the alleged price-fixing conspiracy from parties other than the alleged conspirators. Among the central issues to be decided by the SCC in *Godfrey* is the standard of proof that must be met by plaintiffs, and the economic methodology to be pursued by their experts in fixing that standard, in order to establish harm as a common issue

for the class. The *Godfrey* decision will notably consider the standard applicable in identifying loss to indirect purchasers, and whether lower courts have correctly applied the principles set forth by the SCC in its 2013 trilogy of class action decisions, including *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 [*Microsoft*]. Another important issue at play in the *Godfrey* matter is whether "umbrella" purchasers have a cause of action or are too remote and represent too indefinite a class to advance any claim at all.

[4] In their motion, the Defendants ask me to exercise my discretion pursuant to paragraph 50(1)(b) of the *Federal Courts Act*, RSC 1985, c F-7 [FC Act] and Rule 385(1) of the *Federal Courts Rules*, SOR/98-106 [FC Rules] and to issue: 1) an order temporarily suspending all future deadlines and dates currently set out for this proceeding further to my Scheduling Order of November 29, 2018 [Scheduling Order]; and 2) a direction that a case management conference be convened forthwith after the release of the SCC decision in *Godfrey*.

[5] The Defendants contend that, in the circumstances of this case, a temporary suspension is in the interest of justice and aligns with the just, most expeditious and least expensive determination of this proceeding. In support of their motion, the Defendants submit that a stay of the certification schedule will allow the parties to compile the evidentiary record, brief the legal issues and present their arguments on certification with the benefit of the SCC's guidance on issues that bear directly on the certification of this price-fixing class action. The Defendants plead that the requested suspension will avoid the risk of parties expending potentially significant and unnecessary resources and costs on preparing certification materials that could need to be redone, that a stay will not result in any prejudice to the Plaintiffs and that, based on

the published average time for the SCC to render a decision, the suspension sought will likely be short. They point to several other courts having stayed similar competition class action proceedings pending the SCC decision in *Godfrey*.

[6] The Plaintiffs object to the stay, saying that the Defendants have presented no evidence of harm and that *Godfrey* is not expected to have any bearing on their certification record. They are indeed ready to file their certification materials in accordance with the Scheduling Order and submit that the certification process should proceed as scheduled.

[7] For the reasons that follow, the Defendants' motion will only be granted in part. Further to my review of the evidence and of the particular circumstances and timing surrounding the Defendants' motion, I am not persuaded that, at this juncture, the facts of this case justify the exercise of my discretion in favour of the suspension sought by the Defendants. For all intents and purposes, the Defendants' motion is premature. In my opinion, it is not in the interest of justice to suspend all procedural steps at this point in time, and a stay would not represent an efficient and practical solution for the just, most expeditious, least expensive and fair determination of this class action proceeding. However, I acknowledge that, depending on its contents and the timing of its release, the SCC decision in *Godfrey* could have an impact on future steps and deadlines in this proposed class action, and that a case management conference therefore needs to be convened immediately after the release of that decision. The purpose of this case management conference will be to assess whether, at that point in time, adjustments need to be made to the schedule leading up to the certification motion hearing.

A. *The test to be applied*

[8] The Court's discretionary jurisdiction to temporarily suspend its own proceeding emanates from paragraph 50(1)(b) of the FC Act. This provision empowers me to stay proceedings where "it is in the interest of justice" to do so.

[9] This "interest of justice" test was first described by Justice Stratas in *Mylan Pharmaceuticals ULC v AstraZeneca Canada, Inc*, 2011 FCA 312 [*Mylan*] and was approved by the Federal Court of Appeal [FCA] in *Coote v Lawyers' Professional Indemnity Company*, 2013 FCA 143 [*Coote*] and *Clayton v Canada (Attorney General)*, 2018 FCA 1 [*Clayton*]. In *Mylan*, the FCA distinguished between situations where the FCA was enjoining another body from exercising its jurisdiction and others where the court was deciding not to exercise its own jurisdiction until later. The FCA held that, when it is deciding whether to delay its own hearings pending another appeal, the "interest of justice" test governs. In *Mylan*, as in the current case, the FCA was asked to adjourn its own proceedings pending the result of an appeal before the SCC in another case involving different parties but similar issues.

[10] The "interest of justice" test is a wide-ranging test that can embrace many elements, and I have to consider "all the circumstances" in exercising my judicial discretion to grant or to deny a stay pursuant to it (*Coote* at para 12; *Mylan* at paras 5, 14; *The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 14 [*HarperCollins*] at para 127). In *Mylan*, the FCA pointed to the "broad discretionary considerations" involved by the test, one of those being the public interest consideration in

proceedings moving “fairly and with due dispatch”. The FCA further noted that the courts will not “lightly delay a matter” and that it “all depends on the factual circumstances presented to the Court” (*Mylan* at para 5). Moreover, in considering the interest of justice, the courts should be guided by certain principles including securing “the just, most expeditious and least expensive determination of every proceeding on its merits” as expressly provided by FC Rule 3, and the fact that “[a]s long as no party is unfairly prejudiced and it is in the interests of justice – vital considerations always to be kept front of mind – [the] Court should exercise its discretion against the wasteful use of judicial resources” (*Coote* at paras 12-13; see also *Korea Data Systems (USA), Inc v Aamazing Technologies Inc*, 2012 ONCA 756 at para 19).

[11] More recently, in *Clayton*, the FCA reminded that, in determining whether to stay its own proceedings, the “responsibility of the Court to ensure that proceedings move in an expeditious, timely, and fair manner is a critical consideration” (*Clayton* at para 28).

[12] The “interest of justice” test thus acknowledges that extensive discretionary considerations regarding the administration of justice are at play in the exercise of the Court’s power to impose a stay or suspension of its own proceedings. I agree with the Defendants that *Mylan* and its progeny have clearly established that the usual requirements of the tripartite test for the issuance of interlocutory injunctions or stays, as they were established by the SCC in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*], do not apply here. A moving party requesting the Court to temporarily suspend its own process is not required to prove that irreparable harm will occur if the order sought is not granted, or that the balance of convenience tilts in its favour.

[13] However, the FCA has nonetheless held in *Clayton* that, in assessing the interest of justice, "courts may take into account some of the same considerations as in *RJR-MacDonald* – whether there is a serious issue to be tried, the existence or not of irreparable harm and the overall balance of convenience or interests" (*Clayton* at para 26). Indeed, prejudice or harm to the moving party is not irrelevant in assessing the interest of justice. On the contrary, far from being divorced from the interest of justice, the notions of harm and prejudice are a central element of the considerations to be taken into account by the Court when deciding whether to suspend its proceedings or not. Indeed, when the applicable test is the interest of justice, a moving party still has the burden "to prove that carrying out the action would cause [him or her] prejudice or injustice and not simply inconvenience" (*Barkley v Canada*, 2018 FC 228 at para 5). In fact, in *Clayton*, the failure to demonstrate prejudice was a factor retained and singled out by the FCA to justify the denial of a stay (*Clayton* at paras 26, 28).

[14] In my view, the case law thus establishes that the "interest of justice" test that I need to apply is anchored in three overarching principles: 1) a flexible approach aimed at protecting the interest of a just, fair and efficient resolution of a proceeding; 2) the existence of some form of prejudice, harm or injustice, as opposed to simple inconvenience, to be suffered by the moving party in the absence of a stay; and 3) the determinative place of the particular factual circumstances presented to the Court.

[15] The Defendants submit that, in this case, I should also be guided by the large discretion afforded to case management judges under FC Rule 385(1) to grant a stay of proceedings. This rule allows a case management judge to make "any orders that are necessary for the just, most

expeditious and least expensive determination of the proceedings on its merits". In their written submissions, the Defendants had simply argued that FC Rule 385(1) complemented the Court's power under subsection 50(1) of the FC Act. At the hearing before this Court, however, counsel for the Defendants insisted on FC Rule 385 and went much further, suggesting that, in the particular context of class action proceedings, FC Rule 385 should be read and interpreted as superseding paragraph 50(1)(b) of the FC Act and the case law on the "interest of justice" test.

[16] I am not ready to accept the Defendants' invitation to adopt such an expansive view of FC Rule 385.

[17] I agree with the Defendants that, in the specific context of class proceedings, no cases dealing with the "interest of justice" test have specifically considered the interface between FC Rule 385 and paragraph 50(1)(b) of the FC Act. I also accept that FC Rule 385 is meant to provide latitude to the case management judges. But I do not agree with the Defendants' proposition that, because I am seized of a class action proceeding, FC Rule 385 would somehow trump or override paragraph 50(1)(b) and the case law on stays of the Court's own proceedings.

[18] In fact, I am instead of the view that paragraph 50(1)(b) of the FC Act and FC Rule 385(1) are animated and governed by the same underlying principles and objectives. Outside the context of class action proceedings but in the context of case-managed proceedings more generally, this Court has established that the elements contemplated in FC Rule 385 are already encompassed in the "interest of justice" test of paragraph 50(1)(b) of the FC Act, as the test includes the principles set out in FC Rule 3 (*Power To Change Ministries v Canada*

(Employment, Workforce and Labour), 2019 CanLII 13579 (FC) at paras 16-19; *1395804 Ontario Ltd (Blacklock's Reporter) v Canada (Attorney General)*, 2016 FC 719 [*Blacklock*] at paras 32-33). I point out that, in *Coote*, the FCA had specifically referred to FC Rule 3, which provides that the FC Rules shall generally be interpreted and applied, in all actions or applications before the Court, "so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits". The FCA went on to state that this forms part of the factors to be taken into consideration in the assessment of the interest of justice (*Coote* at para 12). In other words, FC Rule 3 is one of the principles guiding the "interest of justice" test and is embodied in paragraph 50(1)(b). FC Rule 385 simply echoes and repeats the wording used in FC Rule 3.

[19] In *Blacklock*, I had held that the principles set out in paragraph 50(1)(b) of the FC Act and FC Rule 385(1)(a), namely that a stay must be in the interest of justice and allow for the just, most expeditious and least expensive determination of the issues, should both guide a decision to grant or deny a stay (*Blacklock* at paras 32-33). The same remains true here.

[20] In his oral submissions, counsel for the Defendants relied heavily on the SCC decision in *Endean v British Columbia*, 2016 SCC 42 [*Endean*]. In *Endean*, the SCC endorsed an interpretation of two provincial class proceedings legislations which vested courts with "broad discretion", finding that this entitled a case management judge in class action proceedings to impose creative solutions for the efficient determination of issues, in order to ensure a fair and expeditious determination of the matter (*Endean* at paras 37-38). The Defendants argue that FC Rule 385 would be of similar effect and that these broad discretionary considerations should also

guide the Court in this matter. They submit that, as case management judge, I have the flexibility to make any order that I see fit in the interest of the just and efficient resolution of a proceeding, irrespective of any particular harm being established and of the specificities of the interest of justice test developed by the courts.

[21] I am not convinced that the SCC conclusions in *Endean* can be extended to the current situation or that this decision can be used to read FC Rule 385 as superseding paragraph 50(1)(b) of the FC Act in class action matters brought before this Court. In *Endean*, the SCC was considering specific provincial class action proceedings and referred to the interpretation of particular provisions contained in the applicable provincial class action legislations. This is a situation far different from what is contemplated in FC Rule 385, which does not relate specifically to class actions and applies to all specially managed proceedings before this Court. In addition, I note that, pursuant to FC Rule 1.1, the FC Rules apply to all proceedings in this Court "unless otherwise provided by or under an Act of Parliament". Therefore, FC Rule 385 could not override paragraph 50(1)(b) of the FC Act, if doing so meant that case management judges could ignore and get around the attributes of the "interest of justice" test established by the FC Act and the jurisprudence.

[22] I do not dispute the fact that case management judges have a wide margin of discretion in the management of the court process and in making orders respecting the conduct of their proceedings. FC Rule 385 grants broad powers to the judge and lets him or her regulate the conduct of the parties or exempt them from applying certain rules, bearing in mind that the powers conferred under that rule must be exercised in accordance with procedural fairness

(*Mazhero v Fox*, 2014 FCA 219 at para 5). Of course, the interest of justice and the sound administration of justice always involve concerns for a fair, efficient and timely adjudication, as well as an adequate balance between the goals of judicial economy and access to justice. But, paragraph 50(1)(b) of the FC Act and the "interest of justice" test still continue to apply, even in the case management context.

B. ***The facts of this case do not support a stay at this time***

[23] Further to my analysis, I am unable to conclude that, in light of the factual circumstances presented to me, the limited and uncertain nexus between this case and *Godfrey*, and the absence of evidence of prejudice adduced by the Defendants, it would be in the interest of justice to grant the requested stay or that the temporary pause sought by the Defendants would align with the just, most expeditious and least expensive determination of this class action proceeding.

(1) The factual circumstances of this case

[24] In their submissions, the Defendants insisted heavily on other putative class proceedings that have recently been "paused" by courts in British Columbia and Ontario to await the SCC decision in *Godfrey*. They referred to *Asquith v George Weston Limited*, 2018 BCSC 1557 [*Asquith*], *Cygnus Electronics Corporation v Panasonic Corporation*, 2018 ONSC 6761 [*Cygnus*], and *David v Loblaw*, 2018 ONSC 7519 [*David*]. In a letter sent to the Court on March 19, 2019, after the hearing, the Defendants also mentioned a fourth case, *Mancinelli et al v Royal Bank of Canada et al*, Court File No. CV-15-536174-CP [*Mancinelli*], where the Ontario

Superior of Justice issued a direction adjourning the class certification hearing *sine die* pending the SCC decision in *Godfrey*.

[25] The Defendants submit that, in all those cases, concerns over the waste of the parties' resources and of judicial resources led the courts to grant a pause or suspension, and that I should do likewise. I disagree. A temporary stay may have been a justified outcome in those cases, but I find that they involved factual circumstances and timelines vastly different from the present case. A review of those cases reflects that they are more dissimilar than analogous to the case before me, and are easily distinguishable. In essence, each of these stayed actions required the defendants to submit certification materials or to attend a certification hearing in short order, before *Godfrey* was likely to be decided by the SCC, whereas the current motion is far from being brought at the same late stages leading up to an imminent certification motion hearing. In addition, the potential impact of the *Godfrey* decision on those cases was much larger and extended than is the case here.

[26] I should preface my remarks by saying that courts cannot be expected to grant an automatic stay of a pending class action proceeding simply because it happens to be a competition class action whose timing happens to overlap with *Godfrey*. Courts do not look at requests for a stay or suspension in a vacuum or from a principled basis. It all depends on the factual context of each case.

[27] In *Mancinelli*, the certification hearing had been scheduled for mid-June 2019, which would be very close to the timing expected for the issuance of the *Godfrey* decision by the SCC.

In *David*, the proceedings were suspended after the plaintiffs had delivered their certification record but prior to the defendants delivering their responding record, and the certification hearing was scheduled for July 2019, again within a short time frame (*David* at paras 3-4, 25).The decision to pause was made in December 2018, as the defendants' expert reports were due early January 2019. Had there been no pause, it was clear that expert reports would have needed to be amended and redone. In *Cygnus*, the certification hearing was scheduled for March 2019 and the parties had already exchanged certification motion materials when a suspension was ordered (*Cygnus* at para 11). In *Asquith*, the proceedings were suspended prior to the plaintiff submitting her certification materials, which was scheduled for October 2018 (*Asquith* at para 87), and this case followed the pace of the *David* matter.

[28] I should also mention that these cases relied on *Airia Brands Inc v Air Canada*, 2012 ONSC 4773 [*Airia*], where a class action proceeding was adjourned pending the outcome of the SCC decisions in the 2013 trilogy of class action decisions. But, once again, when the *Airia* case was suspended, it was ready to proceed, the certification hearing was scheduled to take place even before the SCC hearings at stake, and there was even a strong possibility that the court might issue its decision before the release of the pending SCC decisions. These were, as the judge said, "very unique" circumstances, with "inevitable duplication" and a "process that would unquestionably have to be redone to some extent" (*Airia* at para 15).

[29] Unlike those cases where the imminence of a potential depletion of resources or the prospect of the certification hearing actually taking place before or at the time of the release of

the SCC decision were reasons supporting the conclusion to grant a stay, the present case operates under a totally different timeline.

[30] In the Scheduling Order, I set out a timetable for all of the steps leading up to the hearing of the certification motion in this proceeding. These steps include the filing of the Plaintiffs' certification record by April 19, 2019; the filing of the Defendants' responding certification record by September 27, 2019; and the filing of the Plaintiffs' reply certification record by October 25, 2019. The hearing of the certification motion is set to begin on April 27, 2020, some 13 months from now, for a duration of five days. Between the end of October and the certification motion hearing, several months are provided for examinations on affidavits and the preparation and filing of the parties' certification memoranda of fact and law.

[31] According to the evidence submitted by the Defendants, the SCC's average reserve time between hearing and decision was 4.6 months in 2017, 4.8 months in 2016, and 5.8 months in 2015. As admitted by the Defendants, the SCC is thus likely to render its decision in *Godfrey* by the end of June 2019, if not earlier. Given the existing Scheduling Order and this evidence on the expected time for the SCC decision, the steps that would be effectively suspended if the Defendants' motion is granted are limited to the filing of the Plaintiffs' certification record, which is due on April 19, 2019, and the early stages of the preparation of the Defendants' responding certification record, which is due on September 27, 2019.

[32] If the *Godfrey* decision is issued within the SCC's average timeframe, the Defendants would therefore still have more than 3 months to prepare their responding certification record,

even if they elected not to start doing anything until after the release of the SCC decision. And there is evidently no risk that the certification motion hearing scheduled for late April 2020 could take place before or even closely after the issuance of the *Godfrey* decision. In fact, there is a large margin of manoeuvre in the current schedule if ever adjustments need to be made after the SCC releases its decision in *Godfrey*, given the ten-month period that would remain between its expected release by late June 2019 and the certification motion hearing scheduled for late April 2020. In sum, the situation in the present case simply does not compare with those other cases where a suspension was granted pending the SCC decision in *Godfrey*.

[33] I further observe that in *Cygnus*, the presiding judge had stated that, if the SCC would have issued its decision in *Godfrey* in December 2018, he was not ready to vacate the March 2019 dates already scheduled for the certification motion hearing in that case. That is, the judge considered that a period of three months between the issuance of the *Godfrey* decision and the certification motion hearing would have been sufficient for the parties to prepare their case. Similarly, in the *Mancinelli* matter brought to the Court's attention by the Defendants, the presiding judge indicated that alternative dates in mid-October 2019 were tentatively set aside to replace the mid-June dates being adjourned. Again, the presiding judge considered that a postponement of the certification motion hearing by about four months would likely be enough to allow the parties to take into account the impact of the SCC decision in *Godfrey* and adjust their certification materials.

[34] The timetable faced by the Defendants in the current case is already far more generous and completely different from those cases where the courts have agreed to "pause" parallel

competition class actions pending the release of the *Godfrey* decision. I am thus not convinced, on the evidence before me and at this stage of the proceedings, that it is a situation where the parties' resources are about to be wasted, where there is an inevitable duplication of work or where scarce public and judicial resources would not be effectively used if this class action proceeding continues.

(2) The more limited nexus with *Godfrey*

[35] Moreover, I do not find that the alleged nexus between the current case and the *Godfrey* matter is as extensive and as compelling as it was in these other matters cited by the Defendants. Contrary to the situation here, all of these cases involved "umbrella purchasers", and expert materials had to be prepared to address the economic impact of the alleged conspiracy on this class of purchasers. In each of these other competition class actions, this was a core reason retained by the presiding judge to wait for the SCC decision in *Godfrey* and to justify the suspension (*Asquith* at paras 67, 80; *Cygnus* at para 5; *David* at paras 8-15). While the Defendants contend that the class defined in the Plaintiffs' claim is broad enough to include umbrella purchasers, the Plaintiffs have confirmed at the hearing before this Court that they are not advancing any "umbrella purchasers" claims (and are ready to amend their claim accordingly). There is therefore no nexus between this case and the "umbrella purchasers" issue expected to be directly addressed by the SCC in *Godfrey*.

[36] That said, I do not dispute that the SCC decision in *Godfrey* could have an impact on this case, since the SCC will also consider the type of expert methodology that is required to certify harm as a common issue, and more specifically the standard to be met at certification to show

commonality of harm suffered by indirect purchasers. This will be a central issue for certification of the Plaintiffs' action. Depending on whether the SCC retains a stricter or softer reading of the *Microsoft* decision, the extent of the work to be conducted and of the data to be produced by the experts to establish commonality of harm to indirect purchasers may vary greatly (*David* at paras 19-20). However, the potential impact of the *Godfrey* decision on this issue appears to be more limited and more uncertain in the present case. The Plaintiffs submit that they will meet or exceed whatever threshold will be established by the SCC in *Godfrey*, whether it is a higher or lower onus placed on plaintiffs. The Plaintiffs are indeed ready to file their certification record on schedule, on April 19, 2019, prior to the release of the decision in *Godfrey*, as they are of the view that the SCC decision will not have an impact on their certification materials.

[37] While the SCC decision in *Godfrey* could have some nexus with this case, it is thus difficult, at this stage, to assess how strong and direct such nexus is likely to be.

(3) The absence of evidence of prejudice

[38] In addition to the different factual circumstances and timing of this case and the more limited nexus with *Godfrey*, I further observe that the Defendants have not demonstrated how they would suffer prejudice or injustice in the absence of a suspension.

[39] The Defendants plead that, absent a stay, the parties and the Court would waste significant resources, because they would have to devote substantial time and expend considerable resources to compile the evidentiary record and otherwise prepare for certification during a time when the decision in *Godfrey* will remain under reserve by the SCC. In particular,

they say that they would have to prepare expert reports without the benefit of the decision in *Godfrey* and could have to revise and redo these reports after the decision is released. They submit that they would suffer harm if they have to start preparing their responding certification materials prior to knowing the contents of the decision in *Godfrey*. At the hearing before this Court, the Defendants specified that they would be unable to complete the preparation of their responding certification record if the five-month timeframe currently contemplated for that step in the Scheduling Order is truncated.

[40] However, the Defendants have provided no affidavit evidence to support their claim that they would suffer prejudice should no pause be granted. FC Rule 363 provides that facts relied on in a motion and which do not appear on the Court file must be set out in an affidavit. True, this rule does not make it necessary to always file an affidavit in support of a motion, as there is an exception when facts relied on already are on the Court file. But when prejudice or injustice is not supported by facts on the record, it needs to be proven by affidavit evidence. In *Frame v Riddle*, 2018 FCA 204 [*Frame*], the FCA recently reminded that principle in very clear words: "[i]t is fundamental that, with very limited exceptions, a motion must be supported by evidence", which evidence must be provided in accordance with FC Rule 363 (*Frame* at para 30; see also *Pfeiffer & Pfeiffer Inc v Lafontaine*, 2003 FCA 391 at para 5; *Laliberte v Canada*, 2004 FC 208 at paras 4-5). This is particularly true in the context of exceptional remedies like an injunction or a stay: "[s]omeone who wishes to benefit from an equitable remedy like a stay must at least establish the facts supporting the application" (*Trabelsi v Canada (Citizenship and Immigration)*, 2016 FC 585 at para 6). Simple assertions, unsupported by evidence, are insufficient to prove prejudice in the context of a stay (*HarperCollins* at paras 68, 97-98).

[41] I accept that the Defendants do not need to meet the more demanding "irreparable harm" requirement set out in *RJR-MacDonald* but, in my opinion, a stay cannot be issued in the "interest of justice" without evidence of prejudice to be suffered by the moving party, unless it would be apparent from the Court file. And it is not sufficient to simply argue the prejudice. Quite the contrary, there needs to be evidence at a convincing level of particularity that shows a real probability that prejudice will result unless a stay is granted. The prejudice must be more than arguable possibilities, speculations or hypotheticals. It needs to be demonstrated.

[42] In this case, there is simply no evidence that, without a suspension of the proceedings at this point in time, unnecessary and wasted expenditures of resources will follow. As indicated above, based on the evidence on the expected release of the *Godfrey* decision by the SCC and the current schedule, the Defendants would still have at least three months to prepare their responding certification record, including their expert reports, even if they were to wait for the SCC decision. There is no evidence supporting the Defendants' assertions that they would be unable to prepare their expert reports and complete their responding certification record in such a time frame. This is purely speculative. In fact, even the cases cited by the Defendants suggest that a period of about three months after the release of the SCC decision in *Godfrey* is expected to be sufficient for the parties to consider the impact of *Godfrey* and be ready for the certification hearing.

[43] The Court will not lightly delay a matter (*Mylan* at para 5). Conversely, a litigant seeking a stay from the courts should not lightly ask for one. It is a pre-requisite for any litigant seeking to benefit from an exceptional equitable remedy like a stay to establish the facts supporting his or

her request. More specifically, a litigant must attest to the prejudice or injustice claimed to be suffered. No matter how eloquent arguments from counsel may be, they cannot replace the need for the litigant to provide clear, convincing and non-speculative evidence supporting any allegations of harm or prejudice. The absence of proper affidavit evidence on this front is kryptonite to a party seeking an extraordinary and exceptional remedy like a stay. In the circumstances of this case, the lack of an affidavit from the Defendants allowing me to find sufficient, reliable evidence in support of their allegations of prejudice is fatal to their request.

[44] The Defendants say that they could not file affidavit evidence at this stage because they do not know what will be the impact of *Godfrey* on the present case. There is indeed uncertainty with respect to both the timing of the *Godfrey* decision and its scope. But this just further illustrates that the Defendants' request is premature considering the particular circumstances and timeline of this proceeding.

C. *The proper course of action to take*

[45] A stay is an exceptional remedy, and I can only decide the Defendants' motion on the basis of the factual circumstances presented to the Court and of the evidence before me. Under both the "interest of justice" test and the broad case management powers conferred upon me by FC Rule 385, granting a suspension is a matter of discretion. In this case, I do not see how, at this juncture, the interest of justice could be served by the suspension of all steps in this class action proceeding pending the release of a SCC decision with uncertain and limited impact on this case, in a factual context where the Defendants have ample time at their disposal to prepare their responding certification record. In other words, the pause requested by the Defendants would not

represent, at this stage and in the circumstances of this case, a fair, timely, efficient and expeditious way to proceed.

[46] In my view, it is simply premature to invoke the spectre of wasted public and judicial resources if the stay sought by the Defendants is not granted. The schedule in this matter does not contemplate immediate steps that will inevitably have to be redone, nor have the Defendants shown how they would suffer a prejudice—as opposed to simple inconvenience—in the event that the proceedings continue according to the timeline set out in the Scheduling Order. There is no indication, let alone any evidence, that the Defendants would be forced, because of the pending SCC decision in *Godfrey*, to expend time and resources to prepare materials and expert evidence that will likely have to be revised, amended or supplemented. On the facts before me, I just cannot find that the benefit of economizing resources outweighs the delay that a suspension would inevitably engender.

[47] What I need to find is the most efficient and practical solution at this point in time (*Airia* at para 19). In this case, it is not to freeze all steps leading to the certification motion hearing, as such an option would be counterproductive and could only have the perverse effect of potentially lengthening the fair, expeditious and efficient resolution of this matter. It would automatically create delays of several months as the Plaintiffs' certification record would not be filed on April 19, and no steps would be taken by the Defendants to start the process of preparing their responding certification record.

[48] When all relevant considerations and the particular context of this motion are factored in, what makes more sense is to allow the process to continue in accordance with the Scheduling Order, to let the parties take the steps to continue to move this matter forward pending the issuance of the SCC decision in *Godfrey*, to set up a case management conference shortly after the release of the SCC decision in *Godfrey*, and to assess whether the interest of justice and a just, most expeditious and least expensive determination of this class action would then call for the schedule to be partially or totally revisited.

[49] By refusing to suspend this class action proceeding now, I am not saying that there may not be grounds to suspend it at a later point, depending on the circumstances, the timing and the contents of the *Godfrey* decision. But agreeing to suspend it now would only serve to increase the risk that the whole schedule, including the certification hearing scheduled for late April 2020, may be put in jeopardy for no good reason as whatever steps that could be reasonably accomplished in the interim period leading up to the *Godfrey* decision would be halted and put on hold.

[50] Given the existing Scheduling Order, a temporary suspension of all future deadlines and dates currently set out for this proceeding would boil down to two things: a suspension of the filing of the Plaintiffs' certification record and a suspension of the initial time period for the preparation of the Defendants' responding certification record. Neither is justified. The Plaintiffs have indicated that they are ready to file their certification record on April 19 and that they do not need to have the benefit of the SCC decision in *Godfrey* for their certification materials and their expert reports. There is no reason to delay this step. In the same vein, I am not persuaded

that the Defendants cannot undertake steps to advance this matter and work on useful elements of their responding certification record after having received the Plaintiffs' certification record on April 19, even without the benefit of the SCC decision in *Godfrey*. No evidence has been provided that no useful steps can be accomplished in the interim period between the date on which the Defendants will receive the Plaintiffs' certification record and the expected date of the release of the SCC decision in *Godfrey*. In my view, nothing would prevent the Defendants from reviewing and analyzing the Plaintiffs' certification record, from starting preparatory groundwork for their certification materials, from securing their experts and having them do background work for their reports, and from ensuring that they set time aside to be ready to do the bulk of the analyses required for their reports in the three months or so that would remain between the expected release of the *Godfrey* decision by late June 2019 and the end of September 2019, when the responding certification record is currently due. There is no reason to postpone this either.

[51] In the particular context of this case and at this point in time, what is in the interest of justice is for the parties to use the time at their disposal. What currently favours both the "just, most expeditious and least expensive" disposition of this proceeding and the "effective use of scarce public resources" is for the proceedings to progress along the path set out in the Scheduling Order. However broad the metrics to measure the interest of justice can be, they do not dictate that I exercise my discretion to grant a temporary suspension of this proceeding now.

[52] That said, I am mindful of the importance of not wasting the parties' resources as well as judicial resources, of avoiding unnecessary spending and duplication of work, and of the general

principles established by FC Rules 3 and 385. I agree that the preparation of expert reports in a price-fixing class action proceeding like this one can be an expensive and time-consuming step in the preparation of a certification record, and that avoiding parties having to redo or supplement their expert reports is a valid objective in scheduling the roadmap to a certification hearing. As such, I do not expect that, until the SCC releases its decision in *Godfrey*, the Defendants will be undertaking work that could reasonably run the risk of having to be redone once the SCC decision is issued. The Defendants could thus decide to postpone to a later date the work most likely to be impacted by *Godfrey*, so that these elements of their responding certification record only be prepared when the parties will know about the *Godfrey* decision and its real impact on this case. In other words, I do not expect that the Defendants will immediately start preparing those portions of their expert reports that could reasonably have to be modified by the SCC decision in *Godfrey*. But I certainly expect that the Defendants will diligently start working on the preparation of other aspects of their responding certification record and take concrete steps to advance matters and issues less likely to be impacted by the *Godfrey* decision and by the legal and evidentiary standard expected to be clarified.

[53] If the Defendants are of the view, once the SCC decision on *Godfrey* is released, that whatever time left is insufficient to allow them to complete their experts reports and their responding certification record, this could be addressed at the case management conference to be convened by the Court or through another motion for stay. It will, of course, be up to the Defendants to demonstrate, when the *Godfrey* decision will have been released and in light of whatever guidance will have been provided by the SCC, why and how the remaining time frame would then be insufficient or unfair to adequately prepare their case, and to convince the Court

that the schedule needs to be revisited, if at all. Should the issue of a temporary suspension resurface at a later point in these proceedings (as nothing in this Order prevents the Defendants from bringing another stay motion should the circumstances change), how the Defendants will have used the time currently contemplated in the Scheduling Order will undoubtedly be among the factors considered by the Court in the exercise of its discretion.

[54] I should specify that, if ever the SCC decision in *Godfrey* was not released within the SCC's average reserve time, it will be open to the Defendants to ask the Court to convene a case management conference in order to discuss the impact that such an unexpected development might have on the schedule of this class action proceeding.

ORDER in T-809-18

THIS COURT ORDERS that:

1. The Defendants' motion is granted in part.

2. The Defendants' request to suspend all future deadlines and dates currently set out in the Scheduling Order issued on November 29, 2018 is denied, without prejudice to the Defendants coming back with a new motion for stay or an informal request to pause once the SCC will have released its decision in *Godfrey*.

3. The Defendants' request for a post-*Godfrey* case management conference is granted, and such case management conference shall be held within two weeks after the release of the SCC decision in *Godfrey*, to determine whether, at that point in time, adjustments need to be made to the Scheduling Order.

4. There is no order of costs.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-809-18
STYLE OF CAUSE:	CHELSEA JENSEN AND LAURENT ABESDRIS v SAMSUNG ELECTRONICS CO. LTD., SAMSUNG SEMICONDUCTOR INC., SAMSUNG ELECTRONICS CANADA, INC., SK HYNIX INC., SK HYNIS AMERICA, INC., MICRON TECHNOLOGY, INC., AND MICRON SEMICONDUCTOR PRODUCTS, INC.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 11, 2019
ORDER AND REASONS:	GASCON J.
DATED:	MARCH 26, 2019

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