SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-06-000543-104
N° : 500-06-000555-116

DATE : September 12, 2012

PRESIDING : THE HONOURABLE LOUIS J. GOUIN, J.S.C.

BEN WAINBERG (500-06-000543-104)
Petitioner
c.
ZIMMER INC. et al.
Respondents

RICHARD BRUNET (500-06-000555-116)
Petitioner
c.
ZIMMER OF CANADA LIMITED et al.
Respondents

JUDGMENT

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1. ZIMMER MOTION

[1] The Court is seized with an "Amended Motion to Stay Either the Proceeding filed by Ben Wainberg or the Proceeding filed by Richard Brunet in accordance with Articles 2, 4.2, 20, 46, 165(1) and 1051 of the *Code of Civil Procedure*" (the "**Zimmer Motion**") filed by the Respondents (collectively "**Zimmer**") in the class actions of *Ben Wainberg v. Zimmer Inc. et al.* (No 500-06-000543-104) (the "**Wainberg Motion**") and *Richard Brunet v. Zimmer of Canada Limited et al.* (No. 500-06-000555-116) (the "**Brunet Motion**").

[2] As both class actions relate to the same alleged defective product, namely the "Durom Acetabular Component" (the "**Durom Cup**"), and claim damages on behalf of all persons in Quebec who were implanted with the Durom Cup, Zimmer requests the stay of either the Wainberg Motion or the Brunet Motion to, *inter alia*, prevent duplicative proceedings and avoid the risk of conflictual judicial findings.

2. WAINBERG MOTION AND BRUNET MOTION

2.1 Wainberg Motion

[3] The Wainberg Motion was filed by Merchant Law Group ("**M.L.G.**") on December 10, 2010, and served on February 1 and 3, 2011.

[4] The group of class members proposed in the Wainberg Motion (the "**Wainberg Class**") is the following :

> "All persons in Canada (including their estates, executors, personal representatives, their dependants and family members), who were implanted with a Zimmer Durom Cup Acetabular Implant;
>
> **ALTERNATELY (OR AS A SUBCLASS):**
>
> All persons in Québec (including their estates, executors, personal representatives, their dependants and family members), who were implanted with a Zimmer Durom Cup Acetabular Hip Implant;"
>
> (The Court underlines)

[5] The Wainberg Motion gives, *inter alia*, an overview of the problems relating to the Durom Cup and, more specifically, those encountered by Petitioner Ben Wainberg (a resident of the City of Laval), the facts giving rise to an individual action by each of the members of the Wainberg Class and the damages claimed, which include compensatory, moral, exemplary and punitive damages.

2.2 Brunet Motion

[6] The Brunet Motion was filed by Kugler Kandestin ("**K.K.**") on February 2, 2011, and served on February 4, 2011.

[7] The group of class members proposed in the Brunet Motion (the "**Brunet Class**") is the following :

> "All natural persons in Quebec who underwent total hip replacement surgery in the Province of Quebec since 2005, and

who had a Durom Large-Diameter Head-Total Hip Arthroplasty ("Durom LDH-THA") surgically implanted."

(The Court underlines)

[8] The Brunet Motion gives also, *inter alia*, a general background of hip implant surgery, the problems allegedly caused by Durom Cup and Zimmer's related alleged liability, details on Petitioner Richard Brunet's (a resident of the City of Ste-Adèle) hip replacement surgery, the facts giving rise to a personal claim by each of the members of the Brunet Class, and the damages claimed, which include pecuniary and non-pecuniary damages, and exemplary and punitive damages.

3. ISSUE

[9] There is no debate as to the existence of the three conditions necessary for the *lis pendens* exception, namely the identity of the : (i) parties, (ii) object and (iii) cause of action, which are the same as those provided for the "authority of a final judgment" (*res judicata*) under Article 2848 of the *Civil code of Quebec*[1].

[10] Therefore, the only issue remaining is to determine which of the Wainberg Motion or Brunet Motion ought to proceed, or to be stayed until final judgment on the other motion.

4. POSITION OF PARTIES

4.1 Zimmer

[11] As both the Wainberg Motion and the Brunet Motion are at the same stage of proceeding, with no substantive steps in the conduct of the authorization process having yet occurred in either proceeding, Zimmer does not favour any of the two motions, although it initially requested to proceed with the Wainberg Motion on the basis of the "First to File" rule.

[12] Zimmer stresses that a multiplicity of proceedings is unfair to it, and one of the two motions has to be stayed to avoid an abuse of the court's process.

[13] Zimmer informs the Court that a mediation session (the "**Mediation**"), presided by retired Justice George Adams, is scheduled for November 15 and 16, 2012, and whichever motion proceeds in Quebec, the related petitioner will be invited to attend and participate in the

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[1] *Rocois Construction Inc. v. Québec Ready Mix Inc.* [1990] 2 R.C.S. 440, 448 (J. Gonthier).

Mediation, in the hope that a settlement is reached for all alleged Zimmer victims in Canada.

4.2 Ben Wainberg

[14] Wainberg submits that the Wainberg Motion should be given priority to proceed first, in accordance with the Quebec "First to file" rule between competing motions to authorize the bringing of a class action.

4.3 Richard Brunet

[15] Mr. Brunet argues that under Quebec law the "First to File" rule is not automatic, but subject to considering which of the motions will serve the best interests of the putative class members.

[16] For that purpose, Mr. Brunet points out that, prior to filing the Wainberg Motion, M.L.G. filed in the province of Quebec, on November 26, 2010, a first "Motion for Authorization to Institute a Class Action" against Zimmer with respect to an alleged defective Durom Cup, namely in the matter of *Lorne Schmidt v. Zimmer, Depuy International Ltd., Depuy Orthopaedics Inc., Johnson & Johnson Corp. and Johnson & Johnson Inc. et al.* (No. 500-06-000539-102) (the "**Schmidt Motion**").

[17] On the other hand, M.L.G. confirms that a "desistment" of the Schmidt Motion should eventually be filed with respect to Zimmer, as it is not involved, either as a manufacturer of the related hip replacement systems, or otherwise.

[18] Moreover, on March 29, 2011, the Schmidt Motion was stayed by Justice Jean-François De Grandpré, j.s.c., (the "**Schmidt Judgment**")[2] until final judgment on another "Motion for Authorization to Institute a Class Action" filed by K.K. on December 21, 2010 in the matter of *Alan Dick v. Johnson & Johnson Inc. and Depuy Orthopaedics Inc.* (No. 500-06-000550-109) (the "**Dick Motion**"). Zimmer is not involved in the Dick Motion.

[19] But Mr. Brunet stresses that, in the Schmidt Judgment, the Court considered that there were grounds to make exception to the "First to File" rule. More specifically, Mr. Brunet refers the Court to the following comments from Justice De Grandpré, j.s.c. :

> "[9] Le Tribunal n'a pas à appliquer aveuglément le principe ou la règle du «First to file». Elle doit s'interpréter avec souplesse

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[2] *Schmidt v. Depuy International Ltd.*, 2011 QCCS 1533 (presently under advisement by the Quebec Court of Appeal).

> comme mon collègue Prévost l'indique dans l'affaire *Sirois c. Menu Foods Income Fund*, 2007 QCCS 5808. Le contraire ouvre la porte au «ambulance chasing», au «forum shopping» et ne sert ni les intérêts d'une saine administration de la justice, ni celui des personnes pouvant s'adresser aux tribunaux par voie de recours collectif; surtout que ces personnes sont effectivement absentes du recours celui-ci étant mené par leur représentant.
> [...]
> [14] Schmidt et ses procureurs voulaient tout simplement occuper le terrain, bloquer l'accès des autres cabinets d'avocats et récolter les bénéfices. Ce ne sera pas le cas. Cette pratique a déjà été sévèrement commentée par le juge Cullity dans l'affaire Tiboni c. Merck Frosst Canada, 2008 CANLII 37911 (Ontario S.C.) Le tribunal fait siens les propos du juge:
>
> > « ***The practice of rushing to commence overlapping actions in as many jurisdictions as possible in order to claim turf and secure carriage for law firms rather than to advance the interests of a putative class, gives ambulance chasing a good name and, in my opinion, smacks of an abuse of process.***»

[20] Mr. Brunet insists that the Wainberg Motion is one of many motions filed by M.L.G. and is an illustration of such practice of rushing to commence overlapping actions in as many jurisdictions as possible.

[21] In fact, as of the date of the hearing, M.L.G. had already filed seven class actions against Zimmer, seeking to represent class members identical to the Wainberg Class, namely :

a. on November 5, 2010, in Alberta, on behalf of Mr. Rodney Day;

b. on November 12, 2010, in Nova Scotia, on behalf of Mr. Donald Manning;

c. on November 19, 2010, in New Brunswick, on behalf of Mr. Jois Nicoles;

d. on November 22, 2010, in Ontario, on behalf of Ms. Peggy D'Anna (the "**D'Anna Matter**");

e. on November 26, 2010, in Quebec, on behalf of Lorne Schmidt (the Schmidt Motion);

f. on December 10, 2010, in Quebec, on behalf of Ben Wainberg (the Wainberg Motion); and

g. on May 22, 2012, in Ontario, on behalf of Gilles and Iris Ducharme (the "**Ducharme Matter**").

[22] Furthermore, concurrently with its last filing on May 22, 2012, M.L.G. entered into a consortium agreement with a number of law firms, including the Ontario firm of Rochon Genova, which also filed a class action in Ontario against Zimmer in a similar matter (the "**Mets Matter**").

[23] As the law firm Klein Lyons had already instituted class actions against Zimmer in British Columbia (the "**Jones Matter**") and in Ontario (the "**McSherry Matter**"), a "carriage motion" to determine which Ontario class action ought to proceed was heard by Justice Perell of the Ontario Superior Court and, on July 13, 2012, he decided[3] that the interests of the members of the class would be best served with Klein Lyons in the McSherry Matter and he stayed the D'Anna Matter, Ducharme Matter and Mets Matter (the "**Ontario McSherry Judgment**").

[24] Mr. Brunet argues that in its analysis, the Court should draw inspiration from some of the criteria mentioned in the Ontario McSherry Judgment, and which are listed hereinafter.

[25] Mr. Brunet submits that M.L.G. has instituted all the above class actions in order to "claim turf and secure carriage" of the class action relating to the alleged defective Durom Cup, and that such way of proceeding should not be condoned by the Court.

[26] Finally, Mr. Brunet submits that K.K. has diligently proceeded with the drafting and filing of the Brunet Motion, and its recognised experience in class actions in an "added value" for the putative class members' best interests.

5. "FIRST TO FILE" RULE

[27] In *Hotte v. Servier Canada Inc.*[4] (the "**Hotte Judgment**"), the Court of Appeal raised the following question :

> "27 Ayant conclu à la triple identité requise pour faire droit à l'exception de litispendance, y a-t-il lieu en conséquence de rejeter les requêtes déposées postérieurement à celle de Hotte?"
>
> (The Court underlines)

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[3] *McSherry v. Zimmer GMBH*, 2012 CanLII 39616.
[4] [1999] R.J.Q. 2598 (C.A.).

[28] Instead of dismissing those subsequent motions, the Court of Appeal stayed them until final judgment in the Hotte matter.

[29] Thereafter, in *Compagnie d'assurances Missisquoi Inc. v. Option consommateurs*[5], the Court of Appeal, referring to the Hotte Judgment, added :

> "[15] En d'autres mots, tout ce que notre Cour a décidé, dans cette affaire Hotte, était de déférer purement et simplement les trois requêtes à un même juge de la Cour supérieure, lui donnant instruction de se saisir d'abord de celle qui avait été déposée la première devant les tribunaux, et de suspendre les deux autres requêtes jusqu'à l'adjudication sur celle-ci. Si elle était accueillie, la litispendance aurait alors son plein effet et les deux autres devraient donc être rejetées. S'il en était autrement et que la requête Hotte était rejetée, alors, le juge se saisirait de la deuxième, puis, le cas échéant, de la troisième."
>
> (The Court underlines)

[30] And thus the so called "First to File" rule was born.

[31] Although some tend to favour[6] an automatic application of the "First to File" rule, others[7], depending on the circumstances, advocate for a discretionary application thereof so as to avoid the practice mentioned above, namely : "[...] of rushing to commence overlapping actions in as many jurisdictions as possible in order to claim turf and secure carriage for law firms rather than to advance the interests of a putative class [...]" [8].

[32] In the Ontario McSherry Judgment, further to the "carriage motion" to decide which of four Ontario class actions against Zimmer ought to proceed in the best interests of the putative class members, Justice Perell identified some of the criteria to be taken into consideration, namely :

> "[...]

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[5] J.E. 2002-1497 (C.A.).
[6] *Marandola v. General Motors du Canada Ltée*, EYB 2004-69313; *Campagna et al. v. Pfizer Canada Inc.*, EYB 2005-95424; *Royer-Brennan v. Apple Computer Inc.*, 2006 QCCS 2451; *Melley c. Toyota Canada Inc.*, 2011 QCCS 1229 (requête pour permission d'appeler rejetée, 2011 QCCA 829, et requête pour autorisation de pourvoi à la Cour suprême rejetée, C.S. Can. 2011-12-08, 3464); *Charland c. Bell Canada* 2012 QCCS 3429.
[7] *Cloutier v. Infineon Technologies a.g.*, 2006 QCCS 3322 (CanLII) (S.C.); *Sirois v. Menu Foods Income Fund*, 2007 QCCS 5808 (CanLII) (S.C.), appeal dismissed, 2008 QCCA 612 (CanLII) (C.A.); *Schmidt v. Depuy International Ltd.*, 2011 QCCS 1533 (CanLII) (S.C.), and presently under advisement by the Court of Appeal.
[8] *Tiboni v. Merck Frosst Canada*, 2008 CANLII 37911 (Ont. S.C., J. Cullity)

(a) the nature and scope of the causes of action advanced;
(b) the theories advanced by counsel as being supportive of the claims advanced;
(c) the state of each class action, including preparation;
(d) the number, size and extent of involvement of the proposed representative plaintiffs;
(e) the relative priority of commencing the class actions;
(f) the resources and experience of counsel;
(g) the presence of any conflicts of interest;
(h) funding:
(i) definition of class membership;
(j) definition of class period;
(k) joinder of defendants;
(l) the correlation between plaintiffs and defendants; and
(m) prospects of certification."[9]

[33] No such criteria have yet been established by the Quebec Courts, although the Appeal Court may consider and determine a course of action further to the appeal of the Schmidt Judgment, which is presently under advisement.

[34] Indeed, in the Appeal Court judgment[10] on the Motion for Leave to Appeal from the Schmidt Judgment, Justice Nicholas Kasirer, j.a.c., writes:

> "[2] Having heard the parties, including counsel for Mr. Dick, I am of the view that the matters raised in this case are among the exceptional circumstances that invite the Court to grant leave from a judgment rendered at this early stage in connection with a motion to authorize a class action[11]. Without limiting in any way the scope of deliberations on the merits of the appeal, I am of the view that these exceptional circumstances include the relationship between the so-called first-to-file rule and the discretionary powers of the judge charged with the case management of the class action proceedings. Furthermore, I am of the view that the criteria for leave to appeal set forth in articles 29 and 511 *C.C.P.*, applied here by analogy, are satisfied in the circumstances, in particular that the pursuit of justice requires that leave be granted."
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> (The Court underlines)

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[9] *McSherry v. Zimmer GMBH*, 2012 CanLII 39616, paragr. [129] and [131].
[10] *Schmidt c. Depuy International Ltd.*, 2011 QCCA 1133.
[11] *Ridley v. Bernèche*, 2006 QCCA 984, paragr. [17] et seq.; *Labrèque c. General Motors of Canada*, 2011, QCCA 617.

[35] Therefore, until the Appeal Court renders its decision on the Schmidt Motion, the "First to File" rule still stands and prevails, except when it is obvious from the drafting of the motion that the best interests of the putative class members are not the counsel's priority.

6. DISCUSSION

[36] From the outset, the Court is of the opinion that a clear distinction exists between the Schmidt Motion and the Wainberg Motion

[37] Contrary to the Wainberg Motion, the Schmidt Motion was poorly drafted. Justice De Grandpré, j.s.c., writes[12] :

> «[8] La formulation du recours de Schmidt ne comporte que trois paragraphes quant à sa réclamation. Aucun détail quant à la façon dont la chirurgie a été faite, quant aux dommages subis, quant aux difficultés encourues, quant au fait qu'il serait apte à représenter un groupe pan-canadien. Ceci démontre que le cabinet qui le représente a préparé les procédures sans information factuelle vérifiée, sans théorie de la cause articulée sérieusement. Le tribunal ne peut avaliser cette façon de faire.»

[38] The Wainberg Motion is far from being similar to the Schmidt Motion, even though it may be the "final product" of a scenario put in place to eventually secure carriage of the intended class action.

[39] As mentioned above, the Wainberg Motion includes essential allegations to support the conclusions, as does the Brunet Motion.

[40] Likewise, the matter of *Sirois v. Menu Foods Income Fund*[13], referred to by Mr. Brunet, is also different from the present matter, as the sole respondent therein did not even have the juridical personality to be a party to an action. Justice André Prévost, j.s.c., writes :

> [30] Le Tribunal conclut donc que la seule intimée poursuivie dans la requête pour autorisation d'exercer un recours collectif de Sirois, déposée le 22 mars 2007, ne possède pas la personnalité juridique et ne peut donc ester en justice.
> [...]
> [68] Il peut paraître étonnant, à première vue, que la poursuite de Sirois n'ait été instituée que contre Menu Foods Income Fund, sans y ajouter les entités corporatives qui sont reliées à la fabrication et à la mise en marché des produits qu'on allègue être contaminés par des produits toxiques. Cela est peut-

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[12] Note 7.
[13] 2007 QCCS 5808 (CanLII) (S.C.), appeal dismissed, 2008 QCCA 612 (CanLII) (C.A.).

> être attribuable à l'empressement de Sirois à déposer son recours.
>
> [69] La règle énoncée dans l'arrêt *Servier* voulant qu'en cas de litispendance, le premier recours déposé au greffe doit procéder et les autres être suspendus, entraîne malheureusement des effets pernicieux. On assiste souvent à une course du type «qui déposera le premier recours?». La qualité des requêtes pour autorisation d'exercer un recours collectif s'en trouve parfois affectée dans un contexte où, depuis la réforme de la procédure civile de 2003, la rédaction de cette procédure a pris une importance capitale en raison des limites imposées au débat s'effectuant au stade de l'autorisation.
> [...]
> [71] De l'avis du Tribunal, il convient d'appliquer la règle de *Servier* avec une certaine souplesse, lorsque requis, pour éviter que des membres visés par un recours ne soient préjudiciés par l'empressement du représentant à déposer la requête en autorisation et ce, au détriment d'un travail préalable adéquat de nature à favoriser l'autorisation du recours.

[41] Therefore, considering the absence of significant difference between the Wainberg Motion and the Brunet Motion that would be detrimental or prejudicial to the putative class members' best interests, the Court is of the opinion that it should not be asked, at this point in time, to review, and opine on, the various steps followed by M.L.G. to come to the filing of the Wainberg Motion.

[42] It is more expedient and efficient, and in the best interests of the putative class members that, in such circumstances, the Court's analysis be on the sole basis of the Wainberg Motion and Brunet Motions *per se*.

[43] Otherwise, each time class actions are filed with respect to the same subject matter, a parallel hearing will be held on the legitimacy of the preliminary steps followed by each counsel.

[44] This is not in the best interests of the putative class members, and more so when the proposed class motions (the "final product") may be favourably compared.

[45] The Court's role of ombudsman for the putative class members is exercised on the basis of the proceedings filed before it and, between two motions appearing to adequately protect the best interests of the putative class members, the "First to File" rule prevails to determine which one ought to proceed and which one ought to be stayed.

[46] Therefore, in the present circumstances, the "First to File" rule will be applied, and the Brunet Motion will be stayed until final judgment on the Wainberg Motion.

FOR THESE REASONS, THE COURT :

[47] **GRANTS** in part Zimmer Motion;

[48] **ORDERS** the stay of the proceedings in the Quebec Superior Court file #500-06-000555-116 until final judgment on the "Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of a Representative" in the Quebec Superior Court file #500-06-000543-104.

[49] **COSTS** to follow.

Louis J. Gouin J.S.C.

LOUIS J. GOUIN, J.S.C.

Dossier: 500-06-000543-104
Mes Owen Falquero and Federico Tyrawskyj
Merchant Law Group
Counsel to Petitioner Ben Wainberg

Mes André Durocher, Julie-Anne Pariseau and Peter Pliszka
Fasken Martineau DuMoulin
Counsel to Respondents

Dossier: 500-06-000555-116
Mes Robert Kugler and Alexandre Brosseau-Wery
Counsel to Petitioner Richard Brunet

Me André Durocher, Julie-Anne Pariseau and Peter Pliszka
Fasken Martineau DuMoulin
Counsel to Respondents

Hearing date : August 15, 2012