Lau et al. v. Bayview Landmark Inc. et al.

[Indexed as: Lau v. Bayview Landmark]

71 O.R. (3d) 487
[2004] O.J. No. 2788
Court File No. 96-CU-113906

Ontario Superior Court of Justice,
Cullity J.

June 28, 2004

Civil proceedings — Class proceedings — Representative plaintiff — Competence of counsel material consideration in approval of representative plaintiff — One of two representative plaintiffs serving notice of change of solicitors because of dissatisfaction with solicitor's carriage of class proceedings — Second representative plaintiff opposing change of solicitors — General rule that co-plaintiffs not to be separately represented — Separate representation not justified in immediate case — New solicitor of record to be appointed in accord with choice of first representative plaintiff — Second representative plaintiff to be removed as representative unless he chooses to appoint solicitor of record chosen by first representative plaintiff.

In November 1996, the plaintiffs L and K brought proceedings under the Class Proceedings Act, 1992, S.O. 1992, c. 6 to recover deposits they and other prospective purchasers had made under agreements to purchase units in a condominium development. B and G, who had an arrangement to apportion the work, were the solicitors of record for the representative plaintiffs.

The certification order as a class proceeding was granted in October 1999, and amended in July 2001. Notice to the class members was not given until February 2004. The discoveries of the defendants had not been completed and no date for the trial of the common issues had been obtained. In April 2004, L, one of the representative plaintiffs, by a notice of change of solicitors, appointed the LM law firm to replace B and G as her solicitors of record. L moved for an order removing JPB and RG as solicitors of record for the plaintiff and for the appointment of LM with the law firm HP to replace B and G. K, the other representative plaintiff, opposed the motion, and wished to continue to be represented by B and G.

Held, the motion should be granted.

The court has the power to depart from the general rule that excludes separate representation for co-plaintiffs, and there is no objection to several lawyers acting as co-counsel and as solicitors of record for all of the representative plaintiffs but, in such cases, the lawyers have an obligation to co-ordinate their representation ***[page488]*** so that they speak with one voice and act together. The court has the power to depart from the general rule and to order separate representation, but such cases are rare, and the order should be made only where it is required to prevent injustice. In the immediate case, no case had been made out to justify separate representation and it was not in the interest of class members that the representative plaintiffs be separately represented. In determining whether a proposed representative plaintiff will fairly and adequately represent the interests of the class, the competence of counsel is a material consideration and, in the immediate case, L had well-founded concerns about the adequacy of the legal representation and the ability of B and G to prosecute the action to a successful conclusion. It was not in the interest of L, of the class, or of justice to strike her notice of change of solicitors. In the

circumstances of this case, the appropriate response was to have LM and HP assume sole carriage of the proceedings and K removed as a representative plaintiff, unless within 14 days he chose to appoint the solicitors chosen by L to represent him in the proceedings.

Cases referred to

Alvi v. Lal, [1990] O.J. No. 739, 13 R.P.R. (2d) 302 (H.C.J.); Battaglia v. Main, [1975] O.J. No. 1501, 2 C.P.C. 267 (Co. Ct.); Canada (Attorney General) v. Canadian Pacific Ltd., [1981] B.C.J. No. 1950, 30 B.C.L.R. 230, 127 D.L.R. (3d) 493, [1981] 6 W.W.R. 473, 22 C.P.C. 252 (S.C.); Hall v. Wilson, [1951] O.W.N. 228 (H.C.); In re Matthews, [1905] 2 Ch. 460 (Ch. D.); Lefki Investment Co. v. 738261 Ontario Inc., [1996] O.J. No. 3523, 8 C.P.C. (4th) 286 (Gen. Div.); Lewis v. Daily Telegraph (No. 2), [1964] 2 Q.B. 601, [1964] 1 All E.R. 705 (C.A.); Manitoba Métis Federation Inc. v. Canada (Attorney General) (2003), 172 Man. R. (2d) 205, [2003] M.J. No. 65, [2003] 6 W.W.R. 327, 29 C.P.C. (5th) 148, 2003 MBQB 40; McLeod v. Winnipeg Supply & Fuel Company Limited, [1934] 2 W.W.R. 385, 42 Man. R. 133 (K.B.); McLeod Lake Indian Band v. British Columbia, [1997] B.C.J. No. 3087, 46 B.C.L.R. (3d) 129 (S.C.); Ricardo v. Air Transat A.T. Inc., [2002] O.J. No. 1090, 21 C.P.C. (5th) 297, [2002] O.T.C. 205 (S.C.J.), supp. reasons (2002), 22 C.P.C. (5th) 285 (Ont. S.C.J.); Ryan v. Hoover (1984), 45 O.R. (2d) 216, 40 C.P.C. 261 (S.C.); Smith v. Thornton (1977), 16 O.R. (2d) 716 (H.C.J.); Vitapharm Canada Ltd. v. F. Hoffman-LaRoche Ltd., [2000] O.J. No. 4594, 4 C.P.C. (5th) 169, [2000] O.T.C. 877 (S.C.J.); Ward-Price v. Marines Haven Inc., [2004] O.J. No. 2308 (S.C.J.); Wedderburn v. Wedderburn (1853), 17 Beav. 158, 51 E.R. 993 (M.R.); Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63, 94 Alta. L.R. (2d) 1, 201 D.L.R. (4th) 385, 272 N.R. 135, [2002] 1 W.W.R. 1, 2001 SCC 46, 8 C.P.C. (5th) 1, affg (1998), 73 Alta. L.R. (3d) 227, 30 C.P.C. (4th) 1 (C.A.), affg (1996), 41 Alta. L.R. (3d) 412, 3 C.P.C. (4th) 329 (Q.B.) (sub nom. Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere)

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5, 8, 10, 12

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 2.03, 5.02, 15.03

Authorities referred to

Cordery, A., Cordery on Solicitors, 8th ed. (London:

Butterworths, 1988)

Halsbury's Laws of England, 4th ed., reissue, vol. 44(1) (Toronto: Butterworths, 1995) ***[page489]***

MOTION to change solicitors of record in proceedings under the Class Proceedings Act, 1992, S.O. 1992, c. 6.

Samuel S. Marr, for plaintiff/moving party, Charmaine Siu Man Lau.

J. Perry Borden, for plaintiff/respondent, Peter Kong.

Daniel Bernstein, for defendants/respondents, Jeffrey Beber and Levitt Beber.

[1] **CULLITY J.**: — Charmaine Siu Man Lau, one of the two representative plaintiffs in this class action, moved for an order removing J. Perry Borden ("Borden") and Roger Gosbee ("Gosbee") as solicitors of record for the plaintiffs and the appointment of Landy, Marr & Associates (the "Landy firm") and Himelfarb, Proszanski (the "Himelfarb firm") to replace them. In the alternative, she requested that all of the above be appointed as co-counsel for the plaintiffs and as their solicitors of record. The motion was opposed by the other representative plaintiff, Peter Kong.

[2] The proceedings were commenced under the Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA") by statement of claim issued on November 7, 1996. The plaintiffs sued to recover deposits they, and other prospective purchasers, had made under agreements to purchase units of a condominium development that subsequently failed. The motion to certify the proceedings was heard by Winkler J. on October 19 and 20, 1999, and granted for reasons delivered by him on October 28, 1999. The order certifying the proceedings was entered on January 25, 2000, and amended on July 27, 2001. Notice to the class members, pursuant to the order, was not given until February 2004. Discoveries of the defendants have not yet been completed and no date for the trial of the common issues has yet been obtained.

[3] A companion class action started earlier by Ms. Lau and another against a firm of solicitors was abandoned a few days before the certification motion in that action was to be heard. Gosbee and Borden were the solicitors of record for the plaintiffs. Curiously, the class was not defined in the statement of claim but appears to have been intended to be the same as the class in this action.

[4] A motion by the plaintiffs for approval of a settlement of the present action with one of the defendants was dismissed by Winkler J. in December 2002. I was told that the sole purpose and effect of the proposed settlement was to permit the plaintiffs to have access to privileged communications between the defendant and his solicitors. It would have provided no other benefit to the class members. Neither Borden nor Gosbee appears to have ***[page490]*** obtained a copy of the endorsement on the record and no formal order was taken out.

[5] At the inception of the proceedings, Borden and Gosbee agreed that, in representing the plaintiffs, they would apportion the work between them on a basis of equality. According to the uncontradicted evidence of Gosbee on this motion, this agreement was not adhered to by Borden. Gosbee's estimate was that he has performed 70-75 per cent of the work. He is a sole practitioner who works from his home with the assistance of his spouse. He acknowledged that he needed the assistance of another lawyer to work with him on the case and that, throughout the proceedings, Borden's failure to do his fair share has created problems with the management of the file. Borden, also, appears to be a sole practitioner. Gosbee's frequent complaints to Borden about his failure to provide services in accordance with their agreement were documented in the record. On April 1 of this year, Gosbee met with the representative plaintiffs and eight other members of the class and told them that, in his judgment, the status quo[cf

1] should not be allowed to continue. He presented them with three options of which at least one, and most probably two, contemplated the removal of Borden as a solicitor of record. He recommended that this should be done.

[6] While the evidence of Mr. Kong was less clear and, perhaps, not entirely consistent with that of Ms. Lau and Gosbee, I am satisfied that, at the end of the meeting, Gosbee was told that a majority of those present were in favour of removing Borden and replacing him with the Landy and Himelfarb firms.

[7] Borden was not invited to the meeting on April 1, 2004, and was unaware that it was being held. However, it appears that shortly after it ended, the class members, or some of them, who had been present had second thoughts. Ms. Lau attributed this to a concern about potential claims Borden might have against them. Although her belief may have been based on hearsay, Gosbee stated in cross-examination that some such concerns had been raised. In his cross-examination, Mr. Kong said that the purpose of the meeting was to address communication problems between Borden and Gosbee, and Borden's failure to attend meetings with Gosbee and purchasers.

[8] A further meeting was called for the following day and held with Borden and Gosbee in attendance. Mr. Kong and four other class members were there. Ms. Lau was at work and unable to be present. At this meeting, Borden presented a timetable for the completion of the examinations for discovery in the summer and the holding of settlement discussions at, or after, a pre-trial conference. He advised the meeting that he was confident that a trial ***[page491]*** date could be obtained before the end of the year. Mr. Kong and the other members of the class present agreed that Borden and Gosbee should remain as solicitors of record. Mr. Kong's evidence was that the possibility that the Landy and Himelfarb firms might be retained was not mentioned at the meeting. Later in the day, however, Borden prepared a letter to Ms. Lau and Mr. Kong in which he addressed the timetable that had been discussed at the meeting and added that the solicitors of record could be replaced by them at any time without additional costs bei ng incurred. Gosbee had previously given similar advice.

[9] Ms. Lau was informed of the outcome of the meeting later on the same day. She maintained her position that Borden should be removed and replaced with the Landy and Himelfarb firms. Peter Kong and two of the other three class members who met with Ms. Lau disagreed. The third member agreed with Ms. Lau.

[10] By a notice of change of solicitors dated April 8, 2004, Ms. Lau appointed the Landy firm as her solicitors of record to replace Borden and Gosbee. At least as early as April 8, Gosbee was advised of Ms. Lau's intention to bring this motion. Borden's response, as communicated by Gosbee to Mr. Marr of the Landy firm -- and maintained by Borden thereafter and at the hearing -- was that he recognized and, indeed, welcomed the appointment of the Landy firm as Ms. Lau's solicitors of record and would not interfere with their representation of her. It was implicit in Borden's response and his subsequent correspondence with Mr. Marr -- and explicit in Borden's submissions on behalf of Mr. Kong at the hearing of the motion -- that he and Gosbee saw no reason why the representative plaintiffs should not be represented by different firms of solicitors and why they could not thereafter take instructions solely from Mr. Kong. In Borden's submission, the concept of class counsel -- in the sense of counsel representing the class after certification -- was unknown in the law of this jurisdiction. Only the representative plaintiffs were represented by the solicitors of record and the latter owed no fiduciary, legal, ethical or professional duties to other members of the certified class.

[11] At the hearing, Borden advised me that his instructions from Mr. Kong were to assert, and defend, his right to choose his own solicitor, that he wished Borden and Gosbee to continue to represent him and that he did not want to be represented by the Landy firm.

[12] Gosbee was in court, but, having provided an affidavit, he was not robed. After the morning recess, however, he requested an opportunity to discuss with Mr. Kong a proposal made by Mr. Marr on the previous day that contemplated that his firm, the ***[page492]*** Himelfarb firm and Messrs. Borden and Gosbee should jointly be solicitors of record for the plaintiffs, with the Landy firm being lead counsel. It was implicit in Borden's earlier submissions that this proposal had already been rejected by Mr. Kong. I indicated that I did not intend to interrupt the hearing but that I would defer the release of my decision pending any further communications from Borden and Gosbee. Gosbee's intervention appeared to be a further indication of the lack of co-ordination in the representation provided by Borden and Gosbee.

Borden did not associate himself with Gosbee's request and made no comment on it. The tenor of his further submissions was that Mr. Kong was adamantly opposed to acceptance of the proposal. Subsequent ly, Borden advised opposing counsel and the court that the proposal of Mr. Marr had been withdrawn on the day of the hearing so that Mr. Gosbee's request was moot.

[13] In her affidavit sworn for the purpose of the motion, Ms. Lau deposed of her frustration at the seven and one-half years that had elapsed since the action was started and with what she described as "the poor quality of legal representation being provided by Gosbee and Borden". She referred to bickering between the two solicitors, Gosbee's constant complaints about Borden's failure to do his fair share of the work, her loss of confidence in their ability to have the case tried successfully and Gosbee's recommendation to her and to Mr. Kong that they should take steps to drop Borden as co-counsel. In cross-examination she referred, also, to the frustration of class members when Borden failed to attend meetings with them, the representative plaintiffs and Gosbee. She stated that it was apparent to her that Borden no longer had an active role in the litigation and that, unless better and more capable counsel were retained, the superior skills of the defendants' counsel would enable them to continue to dela y the litigation. She expressed her confidence in the ability of the Landy firm to conduct the litigation given their involvement in another action to which I will refer below.

[14] In a responding affidavit, Gosbee did not address Ms. Lau's concerns about the delays that had occurred, her criticisms of the quality of the legal representation or his working relationship with Borden. He stated that there was no allegation of misconduct that would justify the removal of them as solicitors of record. Unlike Ms. Lau, he did not think that the Landy firm would better protect the interests of the class members. He said that he believed they were most interested in maximizing their fees -- a criticism that Ms. Lau had levelled at Gosbee in her affidavit.

[15] I accept Ms. Lau's evidence with respect to the quality of legal representation provided by Borden and Gosbee and of their ***[page493]*** inability to work together co-operatively. It was not contradicted by other evidence to any material extent. Much of it was supported by Gosbee's answers in cross-examination and by the correspondence between the two solicitors. It was also supported to some extent by the cross-examination of Mr. Kong and it was consistent with the history of the proceedings.

Analysis

[16] The proposition that there is no rule of practice, authority or principle that prevents representative plaintiffs from having different solicitors of record was fundamental to Mr. Borden's submissions. Separate representation was, he submitted, perfectly acceptable as a general rule, and very common. However, the general rule in civil litigation is the reverse. This is reflected in rule 5.02(1) [Rules of Civil Procedure, R.R.O. 1990, Reg. 194], which provides that two or more persons "who are represented by the same solicitor of record" may be joined as co-plaintiffs. The position was the same under the former rules: Smith v. Thornton (1977), 16 O.R. (2d) 716 (H.C.J.); Battaglia v. Main, [1975] O.J. No. 1501, 2 C.P.C. 267 (Co. Ct.); Hall v. Wilson, [1951] O.W.N. 228 (H.C.); cf., Canada (Attorney General) v. Canadian Pacific Limited, [1981] B.C.J. No. 1950, 127 D.L.R. (3d) 493 (S.C.); Manitoba Métis Federation Inc. v. Canada (Attorney General)[cf1

], [2003] M.J. No. 65, 172 Man. R. (2d) 205 (Q.B.); McLeod Lake Indian Band v. British Columbia., [1997] B.C.J. No. 3087, 46 B.C.L.R. (3d) 129 (S.C.); McLeod v. Winnipeg Supply & Fuel Company Limited, [1934] 2 W.W.R. 385, 42 Man. R. 133 (K.B.); Lewis v. Daily Telegraph (No. 2), [1964] 2 Q.B. 601, [1964] 1 All E.R. 705 (C.A.), at p. 622 Q.B.

[17] The general rule that excludes separate representation of co-plaintiffs is one that has long been

recognized in English law. The reason for it was stated in Wedderburn v. Wedderburn (1853), 17 Beav. 158, 51 E.R. 993 (M.R.), where it appears that two out of six co-plaintiffs moved for an order permitting them to act in person rather than through the solicitor of record for the plaintiffs.

[18] The Master of the Rolls stated:

> Mr. and Mrs. Hawkins may, in concurrence with the other four co-Plaintiffs, remove their solicitor, and the other four may allow him to conduct the proceedings for all. But if the Plaintiffs do not all concur, Mr. Hawkins cannot take a course of proceeding different and apart from the other Plaintiffs, for the consequence would be, that their proceedings might be totally inconsistent. When persons undertake the prosecution of a suit, they must make up their minds whether they will become co-Plaintiffs; for if they do, they must act together. I cannot allow one of several Plaintiffs to act separately from and inconsistently with the others. ***[page494]***

[19] The wisdom of the rule that seeks to avoid procedural deadlock, uncertainties and other obstacles to the orderly conduct of proceedings arising from inconsistent advice to co-plaintiffs is even more apparent in class actions than in other civil proceedings. In class proceedings, counsel have special responsibilities to advise representative plaintiffs not only with respect to the procedural requirements of the CPA but, also, with respect to their responsibilities to advance and protect the interests of class members. There is, of course, no objection to several lawyers, or firms, acting as co-counsel and solicitors of record for all of the representative plaintiffs. The solicitors of record might also retain counsel to act with, and for, them. In such cases, however, they have an obligation to co-ordinate their representation so that they speak with one voice and act together. This is why, when more than one class proceeding has been commenced to make essentially the same claims on behalf o f the same class, the proceedings will not normally be consolidated unless all of the representative plaintiffs will be represented by the same solicitors and counsel. If this cannot be agreed, the court will usually decide which one of the actions is to proceed while the others will be stayed: Vitapharm v. F. Hoffman-LaRoche Ltd., [2000] O.J. No. 4594, 4 C.P.C. (5th) 169 (S.C.J.); Ricardo v. Air Transat A.T. Inc., [2002] O.J. No. 1090, 21 C.P.C. (5th) 297 (S.C.J.).

[20] Absent special circumstances -- which do not appear to have existed here -- I do not believe this action would have been certified with the two representative plaintiffs represented separately. Rather, it is, I believe, virtually certain that they would have been divided into two actions and one of them would then have been stayed.

[21] It is accepted in the authorities that the court has power to depart from the general rule and order separate representation, but it has been said that such cases are likely to be rare and that the order should be made only where this is required to prevent injustice: McLeod Lake Indian Band; Manitoba Métis Federation Inc.; Lewis.

[22] In the cases where separate representation has been permitted, it appears that one or more of the plaintiffs has usually been found to have an interest of some kind that is not shared with the others: see, for example, Alvi v. Lal, [1990] O.J. No. 739, 13 R.P.R. (2d) 302 (H.C.J.) where the court made such an order in lieu of severing the actions. Then J. stated:

> The power of this court to order separate representation has been recognized in [Ryan] v. Hoover (1984), 45 O.R. (2d) 216 (Ont. H.C.); Krollo v. Nixon (1985), 50 O.R. (2d) 285 (Ont. H.C.); 755568 Ontario Ltd v. Linchris Homes (1989), 70 O.R. (2d) 35 (Ont. H.C.). It appears to me that there is good ***[page495]*** reason in the circumstances of this case to

> depart from the norm in that this order will more firmly protect the position of the co-plaintiff and will also in the circumstances ensure that as far "as possible multiplicity of proceeding shall be avoid" [sic] consistent with s. 148 of the Courts of Justice Act.

[23] Similarly, in Lefki Investment Co. v. 738261 Ontario Inc., [1996] O.J. No. 3523, 8 C.P.C. (4th) 286 (Gen. Div.), Pitt J. allowed one plaintiff to be separately represented on the ground that there was an inherent conflict with the interests of other plaintiffs. Such orders would be appropriate where, pursuant to s. 5(2) of the CPA, the court appoints a representative plaintiff for a subclass whose interests require protection. In this case there was no suggestion that either Ms. Lau, or Mr. Kong, should represent a subclass or that their respective interests are in conflict or otherwise materially different. No case has been made out for separate representation and no order permitting separate representation has been requested although this is, essentially, the position that Mr. Kong seeks to have approved: cf., Ryan v. Hoover (1984), 45 O.R. (2d) 216, 40 C.P.C. 261 (S.C.).

[24] I note, also, that Mr. Borden's submission that the solicitors of record for one, or more, representative plaintiffs owe no duties to the class after certification is, in my opinion, of very dubious validity -- to say the least. No authorities in support of the submission were cited and it is inconsistent with the analysis of Nordheimer J. in Ward-Price v. Mariners Haven Inc., [2004] O.J. No. 2308 (S.C.J.) where the learned judge stated [at para. 7]:

> In order to address the issues raised by this motion, it seems to me to first be necessary to determine the nature of the relationship that exists between counsel for the representative plaintiff and the members of the class once certification of the action is granted but prior to the exploration of the opt out period. Simply put, does counsel for the representative plaintiff stand in a solicitor and client relationship with members of the class in this time period? I have earlier expressed the view that there is no solicitor and client relationship between counsel for the representative plaintiff and members of the proposed class prior to the certification of the action as a class proceeding -- see Pearson v. Inco (2001), 57 O.R. (3d) 278 (S.C.J.). At the same time, it seems to me that it is indisputable that a solicitor and client relationship must exist between counsel for the representative plaintiff and the members of the class once the membership of the class has been fixed. At that point, counsel for the representative plaintiff is clearly counsel to the class as certified with all of the duties and obligations that arise under a solicitor and client relationship with respect to the class members including the obligation to represent the class members "resolutely and honourably".

[25] If no relationship of solicitor-and-client exists between solicitors of record and members of the class, there would, presumably, be no duty to give legal advice to class members and no solicitor-client privilege with respect to communications between ***[page496]*** them. The decision of Nordheimer J. was to the contrary even during the opting-out period after certification and his analysis would, in my opinion, apply a fortiori in a case like this where the opting-out period has expired.

[26] In these circumstances, I believe that the general rule that forbids separate representation of co-plaintiffs should apply. It is, in my judgment, not in the interests of class members that the representative plaintiffs be separately represented. The advice they -- and other class members -- receive with respect to the future conduct of the litigation and any settlement negotiations should be co-ordinated and uniform.

[27] The difficult question is how to deal with the situation that has now arisen. I am satisfied that, in order to protect the interests of the class members, it cannot be allowed to continue. None of the orders made in the cases I have cited seems appropriate in the context of proceedings commenced under the

CPA. I am, however, satisfied that jurisdiction to provide a remedy can be found in one, or more, of rule 2.03 that permits compliance with any of the Rules of Civil Procedure to be dispensed with where this is necessary in the interests of justice, s. 12 of the CPA and the inherent jurisdiction of the court.

[28] Section 12 reads as follows:

> The court, on a motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[29] The possibilities include the following:

1. to refuse to accept Ms. Lau's purported change of solicitors;

2. to grant the relief requested in the alternative in the notice of motion; namely, to accept the Landy and Himelfarb firms as co-counsel and solicitors of record for the plaintiffs with Borden and Gosbee;

3. to sever the action into separate proceedings by each of the representative plaintiffs and stay one of them;

4. to grant the relief sought by Ms. Lau in the motion and replace Borden and Gosbee with the Landy and Himelfarb firms as solicitors of record for each of the plaintiffs;

5. to amend the certification order under ss. 8(3) or 10(1) of the CPA by removing either Ms. Lau or Mr. Kong as a representative plaintiff so that the other would act alone and be represented by her, or his, solicitors of choice. ***[page497]***

[30] As far as the first possibility is concerned, the general rule is, of course, that a party has a right to choose his, or her, solicitors of record and change them by delivering a notice pursuant to rule 15.03(1). This is the procedure that was adopted by Ms. Lau.

[31] In Halsbury's Laws of England, 4th ed., reissue (Toronto: Butterworths, 1995), Volume 44(1), para. 118, it is stated:

> The right of a client to change his solicitor is not absolute. For example, one of several co-plaintiffs may not withdraw his joint retainer at pleasure. . . .

[32] A similar statement appeared in Cordery on Solicitors, 8th ed. (London: Butterworths, 1988), at p. 75. In each text, the authority cited is In re Mathews, [1905] 2 Ch. 460 (Ch. D.) where, however, the issue does not appear to have concerned a change of solicitors but, rather, whether one co-plaintiff could withdraw from an action after settling with the defendants.

[33] I believe I would have jurisdiction to refuse to accept Ms. Lau's change of solicitors pursuant to rule 2.03 and s. 12 of the CPA but, in the circumstances, I do not believe such an order would provide a satisfactory solution. It would ignore her well-founded concerns about the adequacy of the legal representation that has been provided, and the ability of Borden and Gosbee to prosecute the action to a successful conclusion. Their failure to work together harmoniously and efficiently in the interests of the class -- let alone their denial, through Borden's submissions at the hearing, of any obligation owed to class members -- is well documented and it is, I believe, reflected in the long delays and the false starts

relating to the companion action and the attempted settlement with one defendant. No satisfactory explanation was given for the failure to give notice of certification for more than four years. The history of their failure to co-ordinate their professional services to the repre sentative plaintiffs and the class culminated with Gosbee's recommendation to the representative plaintiffs that they should dismiss Borden. The belief of Borden and Gosbee that there was no reason why the representative plaintiffs could not be represented separately and that, after Ms. Lau purported to remove them as her solicitors, they could take instructions for the future conduct of the proceedings from Mr. Kong alone, was, in my opinion, egregiously wrong. To infer that their assurances to Mr. Kong and other class members on April 2, 2004, in the absence of Ms. Lau, are likely to bear fruit, and were more than a last-ditch attempt to paper over the gulf in their working relationship, would be to ignore its history and the fact that, even at the hearing, they were not ad idem.

[34] I am satisfied that it is not in the interests of Ms. Lau, of the class or of justice simply to strike the notice of change of ***[page498]*** solicitors and restore the previous status quo against her wishes. Nor do I find the second option to be attractive. I am by no means persuaded that the demonstrated inability of Borden and Gosbee to communicate and work together efficiently in the interests of class members will be best remedied by the addition, without more, of two other firms of solicitors.

[35] The third possibility would achieve a similar result to that which would most probably have occurred if the present problem had arisen prior to certification. It does, however, appear to me to be an unnecessarily artificial method of providing a solution after the action has been certified. The same result can, I believe, be achieved more simply and directly by a combination of the fourth and fifth possibilities. By itself, the fourth -- that requested by Ms. Lau -- would have the effect of forcing Kong to be represented by solicitors that he has not chosen. This could be prevented by giving Mr. Kong the option of remaining a representative plaintiff or being removed as contemplated by the fifth possibility.

[36] The approach just mentioned obviously begs the question whether it is in the interests of the class that Ms. Lau's choice of solicitors should be preferred to Borden and Gosbee. On this question -- as under the first option -- the fact that the original solicitors of record have been involved with the case from its inception and have successfully represented the plaintiffs through the certification process is a factor that must be given some weight and, ordinarily, considerable weight. Neither of the Landy and Himelfarb firms has been involved in these proceedings to any substantial extent although the former was initially retained by 49 members of the class. They have, however, represented different plaintiffs in a class action (the "World Centre action") against the same defendants that involved very similar issues with respect to another development that had failed. The World Centre action was certified under the CPA on September 12, 2001, by Cumming J. who noted the similarity with th e facts of the present proceedings.

[37] The World Centre action was complicated by the existence of other actions by individuals who opted out of the proceedings. These actions and the class action were to be tried together on February 9, 2004. After mediation and a pre-trial, minutes of settlement in the class action were signed on February 10, 2004, and the settlement was approved by Campbell J. on the same day. The successful completion of the proceedings led to suggestions by class members in this action -- who were concerned about its lack of progress and the apparent lack of co-ordination and co-operation between Gosbee and Borden -- that the Landy and Himelfarb firms might become involved in this litigation. ***[page499]*** These suggestions led to separate discussions by Gosbee and Mr. Kong with members of those firms and, ultimately, to the meeting between Gosbee, the representative plaintiffs and eight other class members of April 1, 2004. Mr. Kong had been represented by the Himelfarb firm in the litigation related to the World Ce ntre action.

[38] Any decision that would have the effect of removing the solicitors of record must be considered

to be an extraordinary exercise of the powers conferred by s. 12 of the CPA. It should be made only when the circumstances compel it. However, while the selection of solicitors of record for representative plaintiffs should preferably be made by them, the ultimate responsibility to protect the interests of class members lies with the court. The existence of these interests creates a significant distinction between this case and other civil proceedings where the responsibility for finding a solution might, in some cases, be left to the parties. As I have indicated, I am satisfied that the court must intervene. In all of the circumstances -- including the protracted history of the proceedings, the dysfunctional working relationship between Borden and Gosbee and the deadlock that now exists -- I am of the opinion that the combination of the fourth and fifth possibilities I have mentioned should be implemented by the order of the court. I am satisfied that it is in the interests of the class members that Ms. Lau's desire that the Landy and Himelfarb firms should have sole carriage of the proceedings should prevail. In reaching this conclusion, I have considered whether, in the interests of continuity, the firms chosen by Ms. Lau might act as co-counsel with Gosbee. Apart from Ms. Lau's opposition to her continued representation by him, there is his stated unwillingness to work with the Landy firm. In consequence, I will approve Ms. Lau's change of her solicitors and will amend the certification order to remove Mr. Kong as a representative plaintiff unless, within 14 days of the release of these reasons, he chooses to appoint the solicitors chosen by Ms. Lau to represent him in the proceedings.

[39] In the circumstances of this case, I believe that, if it becomes necessary, Mr. Kong could be removed as a representative plaintiff by an exercise of the jurisdiction to amend certification orders conferred by s. 8(3) of the CPA. I believe the same result could be effected pursuant to s. 10(1) of the Act:

> 10(1) on a motion of a party or class member, where it appears to the court that the conditions mentioned in subsections 5(1) and (2) are not satisfied with respect to a class proceeding, the court may amend the certification order, may decertify the proceeding or may make any other order it considers appropriate.

[40] In determining whether a proposed representative plaintiff will fairly and adequately represent the interests of the ***[page500]*** class as required by s. 5(1)(e), it has been recognized that the competence of counsel is a material consideration: Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63, at p. 555 S.C.R. per McLachlin C.J.C. Competence for this purpose must include the ability of the solicitors of record to work together efficiently so as to retain the confidence of their clients and to advance and protect the interests of class members.

[41] If Mr. Kong is removed as a representative plaintiff, this will be without prejudice to any order that may be made awarding the defendants their costs of the proceedings to date.

[42] There will be no order for the costs of this motion.

Order accordingly.