

04-CV-264146 CP

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

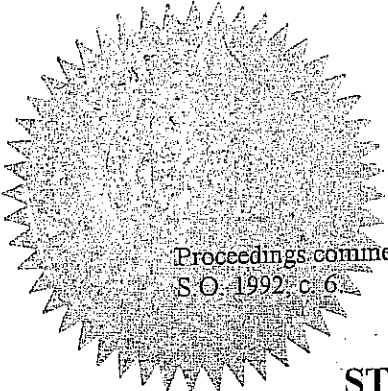
CHRISTOPHER HIRST

Plaintiff

- and -

SONY OF CANADA LTD. and
TOYS "R" US (CANADA) LTD.

Defendants



Proceedings commenced pursuant to the *Class Proceedings Act, 1992*,
S.O. 1992, c. 6

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. If you wish to defend this proceeding but are unable to pay legal fees, legal aid may be available to you by contacting a local legal aid office.

2004 February 2004
Issue Date: January , 2004

Issued by A. Dineen
Local registrar

Address of court office:
393 University Avenue- 10th Floor
Toronto, Ontario
M5G 1E6

TO: Sony of Canada Ltd.
115 Gordon Baker Road
Toronto, Ontario
M2H 3R6

AND TO: Toys "R" Us (Canada) Ltd.
2777 Langstaff Road
Concord, Ontario
L4K 4M5

CLAIM

1. The plaintiff claims on his own behalf and on behalf of all of the members of the Class (as defined below):
 - (a) an order certifying this proceeding as a Class proceeding and appointing the plaintiff as representative plaintiff for the members of the Class (as defined below) and any appropriate subclass thereof;
 - (b) general damages in the amount of \$250,000,000.00;
 - (c) special damages in the amount of \$250,000,000.00;
 - (d) exemplary, punitive and aggravated damages in the amount of \$50,000,000.00;
 - (e) damages equivalent to the sums the plaintiff and the members of the Class (as defined below) have paid in attempts to identify and repair the PS2 Defect (as defined below);
 - (f) damages equivalent to the costs of rectifying the PS2 Defect (as defined below);
 - (g) damages equivalent to the diminution of the value of the PS2 Consoles (as defined below);
 - (h) prejudgment and post judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. 43, as amended, where applicable;

- (i) costs of this action on a substantial indemnity basis together with any applicable Goods and Services Tax payable pursuant to the *Excise Tax Act*, R.S.C. 1990, C. E-15; and,
- (j) such further relief as this Honourable Court may deem just.

THE PARTIES

2. The plaintiff, Christopher Hirst, resides in the City of Toronto, in the Province of Ontario. He purchased a Sony PlayStation 2 video game console from the defendant, Toys "R" Us (Canada) Ltd., in the City of Toronto in December 2000.
3. The defendant, Sony of Canada Ltd. ("Sony") is a company incorporated pursuant to the laws of Canada and carries on business throughout Canada. Sony is wholly owned and controlled by Sony Corporation, a corporation incorporated pursuant to the laws of Japan. Sony markets, distributes and sells its products throughout Canada directly and through its retail division, which it operates under the style name "The Sony Store".
4. The defendant, Toys "R" Us Canada Ltd. ("Toys "R" Us") is a company incorporated under the laws of the Province of Ontario and carries on business throughout Canada. It purchases Sony products from Sony and sells those products to consumers including the plaintiff and members of the Class (as defined below). The plaintiff pleads that all Toys "R" Us purchases from Sony are made pursuant to contracts negotiated or entered into between them in Ontario. In addition, the Sony products purchased by Toys "R" Us from Sony are distributed by Sony to Toys "R" Us from Sony's facilities in Ontario.

PS2 CONSOLE – BACKGROUND

6. Sony markets and distributes a variety of electronic products bearing the Sony brand name, including the Sony PlayStation 2 video game console (individually the "PS2 Console" and collectively the "PS2 Consoles"). Sony markets and distributes the PS2 Consoles and the published software for the PS2 Consoles; it also participates in managing the software licensing program by which third parties create software (e.g. video games) intended to be played on the PS2 Consoles. The PS2 Console is the successor

to the original Sony PlayStation game console. The PS2 Consoles were designed to be backward compatible with the original PlayStation software, so that the PS2 Consoles could play video games made for the original PlayStation consoles. The PS2 Consoles were designed to support both audio compact disc ("CD") and digital video disc ("DVD") formats, so that the PS2 Consoles could play music, video images and game software contained on CDs or DVDs. The DVD format is essentially a bigger, faster CD and is a technology widely regarded as the next generation of optical disc storage, able to hold video, as well as audio and computer data in a single digital format.

7. The PS2 Consoles are sold primarily through retail outlets (including through The Sony Store and Toys "R" Us), which act as Sony's agents. Sony exercises control over these outlets with regard to, among other things, pricing and advertising, as well as controlling the repair and servicing of the PS2 Consoles. When sold, the PS2 Consoles come in factory sealed boxes that reflect Sony's brand name as the manufacturer.
8. The PS2 Consoles come with a standard limited warranty (the "Warranty"). The Warranty provides a one-year limited warranty from the date of original purchase on parts and a ninety (90) day limited warranty from the date of original purchase on labour. After the ninety (90) day labour period, the customer pays for all labour charges.
9. Sony has made various representations about the PS2 Consoles the common theme of which is that the PS2 Consoles are backward compatible with the original PlayStation, the PS2 Consoles would have the largest software library assembled and that the PS2 Consoles that would bring games, music and movies all together in a single entertainment system. In addition, Sony represented the PS2 Consoles as quality products, with longevity, reliability, innovation and exceedingly high engineering standards. In advertisements in newspapers and magazines, as well as releases to the public, all of which Sony disseminated, Sony states regarding its PS2 Consoles: *"The new system is backwards compatible with the original Sony PlayStation, bridging the gap between the two systems while legitimizing consumers' investment in their existing PlayStation software libraries."*; *"Presenting the largest software library ever assembled for a home entertainment product.... Combine the more than 800 PlayStation titles currently*

available with the ability to play this library on PlayStation 2, and the new system boasts the broadest software catalogue ever created.”; “In addition to the massive software line-up assembled to support the new system, PlayStation 2 is compatible with the existing PlayStation software catalogue of more than 800 titles now on the market, offering the broadest choice of software.”; “The PlayStation 2 not only plays graphically stunning game titles, but also DVD movies and audio CDs.”. The above are only some of the numerous representations made by Sony promoting the performance, qualities and features of the PS2 Consoles. These representations did not disclose the PS2 Defect (as defined below) and therefore, were materially misleading.

THE PS2 DEFECT

10. Sony marketed, distributed and sold the PS2 Consoles commencing in October of 2000. Since that time, the PS2 Consoles have experienced performance problems related to a common and uniform defect (the “PS2 Defect”), which often manifests itself within months after purchase. The malfunctions resulting from the PS2 Defect are virtually identical: (i) inability to read “blue-bottom” CD games (i.e. games on compact disc formats with blue colour reverse sides); (ii) inability to read DVDs; (iii) inability to read original PlayStation games.
11. Frequently, the PS2 Consoles ~~inability to read the games is accompanied~~ by a series of common symptoms and problems, such as “freezing” of the user’s viewing screen, the “No Disk” error problem or the Disc read error” indicator problem, along with noises described as “banging” or “clicking”. Sometimes, the PS2 Consoles simply cease functioning or become inoperable.
12. Since commencing the marketing, sale and distribution of the PS2 Consoles, Sony has had evidence that the PS2 Consoles were subject to the PS2 Defect. Customer service centres and repair shops have reported a large number of complaints and repair requests resulting from the PS2 Defect. As well, Sony customers have also frequently complained about their PS2 Consoles and the PS2 Defect on a host of Internet websites. However, Sony did not recall the PS2 Consoles and/or failed to warn the public of any potential problems with the PS2 Consoles. On the contrary, Sony continued to market, distribute and sell the PS2 Consoles notwithstanding the PS2 Defect.

13. The plaintiffs plead that Toys "R" Us was also aware (or in the alternative, ought to have been aware) that the PS2 Consoles were subject to the PS2 Defect. Toys "R" Us also failed to warn its customers of the potential problems with the PS2 Consoles and continued to sell the PS2 Consoles notwithstanding the PS2 Defect.

**SALE OF GOODS ACT, CONSUMER PROTECTION ACT, BUSINESS PRACTICES ACT AND
COMPETITION ACT**

14. The plaintiff and the members of the Class (as defined below) plead and rely upon the *Sale of Goods Act* (Ontario and equivalent legislation in force in their respective jurisdictions are referred to below as "Ontario and equivalent"), *Consumer Protection Act* (Ontario and equivalent), *Business Practices Act* (Ontario and equivalent), and the *Competition Act* (Canada) and plead:
- (a) it is an implied condition pursuant to the *Sale of Goods Act* (Ontario and equivalent) and the provisions of the *Consumer Protection Act* (Ontario and equivalent) that goods shall be of merchantable quality and reasonably fit for the purpose for which the goods are required;
 - (b) Section 34 of the *Consumer Protection Act* (Ontario and equivalent) provides that in the event of a "consumer sale", the implied conditions and warranties applying to the sale of goods by virtue of the *Sale of Goods Act* (Ontario and equivalent) apply to goods sold by a consumer sale and those implied conditions and warranties cannot be varied or eliminated by contract.
 - (c) it is an unfair practice contrary to the *Business Practices Act* (Ontario and equivalent) to make false, misleading and deceptive representations, including representations that goods are of a particular standard, quality and grade, if they are not; and,
 - (d) it is a contravention of the *Competition Act* (Canada) when a person, for the purpose of promoting, directly or indirectly, the supply or use of a product, knowingly or recklessly makes representations to the public that are false or misleading in material respects.

15. The plaintiffs and the members of the Class (as defined below) plead that Sony is in breach of the requisite provisions of the *Sale of Goods Act* (Ontario and equivalent), *Consumer Protection Act* (Ontario and equivalent), *Business Practices Act* (Ontario and equivalent) and *Competition Act* (Canada) in that:

- (a) the PS2 Consoles were not of merchantable quality, nor were reasonably fit for the intended purpose;
- (b) Sony engaged in an unfair practice in making false, misleading and deceptive representations and in failing to disclose the PS2 Defect, including representations that the PS2 Consoles were capable of playing "blue bottom" CD games, CDs and DVDs and that the PS2 Consoles were of a particular standard, quality and grade. The representations were made intending that the plaintiff and members of the Class (as defined below) rely upon them and the plaintiff and members of the Class (as defined below) did rely upon them when they purchased the PS2 Consoles; and
- (c) Sony for the purpose of promoting, directly or indirectly, the supply or use of the PS2 Consoles, recklessly or negligently made representations to the public that were false or misleading in material respects, in that Sony did not disclose the PS2 Defect. The representations were made for the purpose of inducing the plaintiff and members of the Class (as defined below) to purchase the PS2 Consoles and the plaintiff and members of the Class (as defined below) relied upon the representations when purchasing the PS2 Consoles.

16. The plaintiff and the members of the Class (as defined below) plead that Toys "R" Us is in breach of the requisite provisions of the *Sale of Goods Act* (R.S.B.C., 1996 c.410) in that the PS2 Consoles it sold were not of merchantable quality, nor were reasonably fit for the intended purpose.

**DUTY OF CARE AND OTHER DUTIES OWED BY SONY TO THE PLAINTIFF AND THE MEMBERS
OF THE CLASS**

17. The plaintiff and the members of the Class (as defined below) plead that Sony as the marketer, distributor and vendor owed to the plaintiff and the members of the Class (as defined below) the following duties of care and other duties:

- (a) to ensure that the PS2 Consoles were designed and/or manufactured properly and in a good and workmanlike manner;
- (b) to ensure that the PS2 Consoles were properly researched and tested and that adequate pre-market testing of the PS2 Consoles was carried out;
- (c) to advise and inform of the true facts regarding the PS2 Consoles and not conceal or suppress the nature and scope of the PS2 Defect;
- (d) to remedy the PS2 Defect upon discovering it through the recall and repair of the PS2 Consoles;
- (e) to ensure that representations made by Sony, its agents and distributors in regard to the PS2 Consoles were made in good faith, honestly and truthfully;
- (f) not to make misrepresentations concerning the PS2 Consoles and omissions concerning the PS2 Defect;
- (g) to act in good faith towards the plaintiff and the members of the Class (as defined below);
- (h) not to make negligent misrepresentations concerning the attributes, performance, quality and character of the PS2 Consoles and omissions concerning the PS2 Defect; and
- (i) not to suppress any information concerning the PS2 Defect.

18. The plaintiff and the members of the Class (as defined below) plead that the Sony is in breach of its duties of care and other duties in that:

- (a) the PS2 Consoles were negligently designed in a manner which, under normal conditions, usage and applications would cause the PS2 Consoles to malfunction as a result of the PS2 Defect;

- (b) the PS2 Consoles were negligently manufactured in a manner which, under normal conditions, usage and applications would cause the PS2 Consoles to malfunction as a result of the PS2 Defect;
- (c) proper research and testing of the PS2 Consoles and adequate pre-market testing of the PS2 Consoles to detect malfunctions and remedy the PS2 Defect were not carried out;
- (d) Sony continues to fail to fulfil its ongoing obligation to fully disclose the results of the testing and research in connection with the malfunctions resulting from the PS2 Defect;
- (e) Sony knew or ought to have known the existence of the PS2 Defect and either knew or recklessly disregarded the potential ramifications of disclosing the PS2 Defect to the public but failed and/or refused to do so;
- (f) Sony failed to disclose the true facts concerning the PS2 Defect and concealed the nature and scope of the PS2 Defect and where any information was provided to the public generally, such information was incomplete or misleading in that it sought to attribute any problems to factors other than the PS2 Defect;
- (g) Sony failed to institute an effective product recall upon discovering the PS2 Defect or the potential for the PS2 Defect to occur;
- (h) Sony failed to remedy and/or repair the PS2 Defect upon discovering it;
- (i) Sony knew or ought to have known that the PS2 Consoles would malfunction as a result of the PS2 Defect;
- (j) Sony acted recklessly in that they were aware that the PS2 Consoles would malfunction as a result of the PS2 Defect when they marketed and sold the PS2 Consoles to the plaintiffs and the members of the Class (as defined below);
- (k) representations made by Sony, its agents and distributors in regard to the PS2 Consoles were false, misleading and deceptive and were not made in good faith, honestly and truthfully in that Sony failed to disclose in any of the representations, the existence of the PS2 Defect; and,
- (l) Sony negligently misrepresented various facts regarding the performance, quality, reliability and character of the PS2 Consoles, under circumstances where Sony either

knew or ought to have known that the representations were not true or known to be true in that Sony failed to disclose in any of the representations, the existence of the PS2 Defect. Such non-disclosure constitutes reckless, or in the alternative, negligent misrepresentation and such misrepresentations were made with the intention of the plaintiff and members of the Class (as defined below) relying upon them and the plaintiff and members of the Class did in fact rely upon them. The aforesaid representations were contained in various advertising, press releases, online material, packaging and correspondence from Sony and such failure to disclose the PS2 Defect was further reiterated and disseminated by Sony's agents and representatives within the actual or ostensible scope of their authority.

WARRANTY

19. The plaintiffs and the members of the Class (as defined below) plead that the Warranty provided by Sony, which purports to limit the obligations of Sony, is invalid or unenforceable in that:

- (a) the provisions of Section 34 of the *Consumer Protection Act* (Ontario and equivalent) prohibit the negating or varying of the implied conditions and warranties under the *Sale of Goods Act* (Ontario and equivalent);
- (b) Sony and the manufacturer have refused and/or failed to honour the Warranty;
- (c) the terms of the Warranty are unreasonable, unconscionable and were not agreed to by the plaintiff and the members of the Class (as defined below) at the time that the PS2 Consoles were purchased;
- (d) Sony knew that the PS2 Consoles would fail before the expiry of their expected lives as a result of the PS2 Defect, or in the alternative, acted recklessly in failing to ascertain this fact or, in the further alternative, acted negligently in failing to ascertain this fact, thereby rendering the time limitations contained in the Warranty insufficient and inadequate.

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DAMAGES

20. As a result of the breaches as pleaded above, the plaintiff and the members of the Class (as defined below) have suffered loss and damages, the particulars of which include:

- (a) damages equivalent to the diagnostic and repair costs related to the PS2 Defect;
- (b) damages equivalent to the diminution in the value of the PS2 Consoles;
- (c) damages for overpayment for the PS2 Consoles, which contained a latent defect;
- (d) future costs of repair of the PS2 Consoles; and,
- (e) damages including the full cost of any investigation in connection with this action;
- (f) damages as calculated pursuant to paragraphs 51 and 52 of the *Sale of Goods Act* (Ontario and equivalent).

21. The plaintiff and members of the Class (as defined below) have suffered and continue to suffer damages as a result of Sony's wrongful acts and omissions as alleged above.

REPRESENTATIVE PLAINTIFF

22. The particulars of the purchase made by the representative plaintiff are pleaded above. The representative plaintiff purchased the PS2 Console in December 2000. The PS2 Console of the representative plaintiff malfunctioned thereafter when it began to skip and freeze during play and display error messages. The PS2 Console of the representative plaintiff continues to malfunction. The PS2 Console purchased by the representative plaintiff was defective and the representative plaintiff has suffered the damages as pleaded above.

THE CLASS

23. The plaintiff brings this action on his own behalf and on behalf of all persons resident in Canada (the "Class") who have purchased or acquired from October 2000 to the present, PS2 Consoles manufactured, distributed and sold by Sony or by Toys "R" Us to the plaintiff and members of the Class.

25. The plaintiff proposes that this action be tried at the City of Toronto, in the Province of Ontario.

DATED:

2000 February
~~January~~, 2004

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Solicitors for the plaintiffs

CHRISTOPHER HIRST

Plaintiff

- and -

SONY OF CANADA LTD., et al

Defendants

Court File No. *04-e/1-264146 CP*

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

STATEMENT OF CLAIM

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