COURT FILE NO.: 503-08
DATE: 2008/11/24

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: BENNY MIGNACCA & ELAINE MIGNACCA v. MERCK FROSST CANADA LTD., MERCK FROSST CANADA & CO. & MERCK & CO., INC.

BEFORE: Justice D. Bellamy

COUNSEL: Harvey T. Strosberg, Q.C., Michael J. Peerless, Michael A. Eizenga, Sabrina Lombardi and Jonathan Bida for the Plaintiffs/Responding Parties

Neil Finkelstein, Catherine Beagon Flood and Mary M. Thomson for the Defendants/Moving Parties

HEARD AT TORONTO: November 17, 2008

ENDORSEMENT

Bellamy, J.

Overview

[1] The defendants ("Merck") seek leave to appeal from a decision of Justice Maurice Cullity released on July 28, 2008, in which he dismissed Merck's motion to stay this proceeding, pending the final disposition of an overlapping class action previously certified in Saskatchewan.

[2] Merck also seeks leave to appeal the certification order of Cullity, J. issued September 15, 2008, pursuant to reasons released on July 28, 2008, in which he certified this action as a class proceeding under the *Class Proceedings Act, 1992,* S.O. 1992, c. 6.

[3] Merck also raises, for the first time, constitutional questions with respect to each of these motions.

[4] For the reasons that follow, the motion for leave to appeal the order dismissing the defendants' motion to stay this proceeding is allowed; the motion for leave to appeal the certification order is dismissed, as is the application to raise constitutional questions.

Background

[5] This class action is with respect to the drug Vioxx which is a pain reliever and anti-inflammatory drug manufactured and distributed since 1999 by Merck. Health Canada had approved it as safe and efficacious for the treatment of certain pain conditions. Until Merck withdrew it from the market on September 30, 2004, Vioxx had been available as a prescription medicine.

[6] On October 1st, the day after Vioxx had been withdrawn from the market, the plaintiffs commenced this proceeding. Other users of the drug also began class proceedings in Canada and elsewhere. One of those was Gerald Wuttunee. Represented by a Saskatchewan law firm ("the Merchant Law Group"), he began a class action proceeding in Saskatchewan on October 1st and in Ontario on October 4th.

[7] By the time Cullity, J. began hearing this certification application on June 24, 2008, only three weeks earlier, Klebuc, C.J.S. sitting *ex officio* on the Saskatchewan Court of Queen's Bench, had released a decision certifying in Saskatchewan a multi-jurisdictional opt-out class action proceeding involving Vioxx and Merck: *Wuttunee v. Merck Frosst Canada Ltd.*, [2008] S.J. No. 324.

[8] That Saskatchewan-related Wuttunee action was not unknown to Ontario. Over two years earlier, on February 2, 2006, Winkler J., as he then was, concluded in a carriage motion that the action which is the subject of the leave motion before me should be permitted to continue, and he ordered that the Ontario-related Wuttunee action involving the Merchant Law Group be stayed until further order of the court: then *sub. nom. Setterington et al. v. Merck Frosst Canada Ltd. et al.*, [2006] O.J. No. 376 (S.C.J.).

[9] The Saskatchewan and the Ontario matters then proceeded in their respective jurisdictions. With the Saskatchewan decision having taken place just weeks before the Ontario certification hearing was to be heard, the matter had now, to quote Justice Cullity in paragraph 4 of his decision, "come to a head."

[10] Cullity, J. allowed the plaintiffs' application to certify this proceeding as a class action, and denied Merck's motion for a stay of the proceedings pending the conclusion of the Saskatchewan action. Merck now moves for leave to appeal both of these decisions.

Constitutional questions

[11] In the event that it is granted leave to appeal the certification decision, Merck also seeks leave to challenge the constitutionality of the *Class Proceedings Act* on appeal on the basis that, to the extent that it purports to grant the courts of Ontario jurisdiction over persons who have no real and substantial connection to this province, it is *ultra vires* and has unconstitutional extra-provincial effects.

[12] The plaintiffs submit that Merck should be denied leave to raise these jurisdictional and constitutional issues on appeal, as they were not raised before Cullity, J. and as a general rule appellate courts refuse to hear issues on appeal that were not raised at first instance.

[13] This application is denied. These very same constitutional and jurisdictional issues have previously been before the courts in multi-jurisdictional class proceedings, and were recently raised by Merck before the Saskatchewan Court of Appeal in the Saskatchewan Vioxx litigation. That Court saw no reason to stray from the general rule that constitutional arguments should not be raised for the first time on appeal, and neither do I. Where new issues are raised, prejudice may be caused to the other side by "the lack of opportunity to respond and adduce evidence at trial," and there will not be "a sufficient record upon which to make the findings of fact necessary to properly rule on the new issues": *R. v. Brown*, [1993] 2 S.C.R. 918 at para. 10.

[14] The issues that Merck purports to raise on appeal in this case are not purely jurisdictional questions, which may be considered in these circumstances, but instead are embedded in other questions of law and fact surrounding multi-jurisdictional class actions.

Stay of Proceedings

[15] Merck submits that the effect of Justice Cullity's decision is that Merck is now a defendant in a multiplicity of multi-jurisdictional proceedings brought by substantially the same national plaintiff class in respect of substantially the same claim. This raises the prospect of conflicting decisions in respect of the same matter. Accordingly, Merck says, it is the subject of an abuse of process pursuant to s. 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which states that: "As far as possible, multiplicity of legal proceedings shall be avoided."

[16] The plaintiffs concede that Merck should be granted leave to appeal the decision not to grant a stay, but only to the extent that that decision purports to deny a stay of proceedings to non-resident plaintiffs. While I understand their argument, I believe that position is too narrow.

[17] Cullity, J. recognized that the issue of competing multi-jurisdictional class actions was likely to become a problem. At paragraphs 3 and 4 of his decision, he noted:

> Although the possibility of overlapping classes in cases in different Canadian jurisdictions existed previously, the potential problems that might arise became most obvious when this court, with its opt-out regime, began to certify national classes. Until recently, these problems have been largely avoided through the co-operation of plaintiffs' counsel in different jurisdictions, and by the willingness of the court in Ontario to exclude from a certified class residents of provinces in which class proceedings are pending.
>
> In this case, the problems have come to a head as, although substantial agreement with respect to the prosecution of most of the cases has been achieved among counsel (the National Consortium") for the plaintiffs, agreement has not been reached with a Saskatchewan law firm (the Merchant Group") that is acting for plaintiffs in cases commenced in most of the common law provinces.

[18] The plaintiffs argue that there is no absolute rule that a stay must be granted in a case such as this. They argue that Cullity, J. properly determined that the doctrine of comity should not be applied to stay the Ontario action. Indeed, they argue, it is the Saskatchewan court that did not act properly, appropriately or reasonably in exercising its jurisdiction to make the Saskatchewan certification order.

[19] All that may well be true. It seems to me, though, that Cullity, J. was very much alive to the dilemma and clearly recognized that this case is the very one that has brought the issue of competing multi-jurisdictional class actions to a head.

[20] Given the earlier decision in Saskatchewan, there is good reason to doubt the correctness of the refusal to grant a stay. In coming to this conclusion, I need not find that Cullity, J. erred, but only that "the correctness of the order is open to very serious debate": *Ash v. Lloyd's Corp.* (1992), 8 O.R. (3d) 282 at 284 (Gen.Div.). In my view, his decision is indeed open to very serious debate, given the potential results of allowing two overlapping multi-jurisdictional class actions in different provinces to proceed *in tandem*. Generally, the real possibility that significant confusion may arise where plaintiffs are included in multiple actions addressing similar claims leads courts in one province to give "full faith and credit" to the judgments given by a court in another province or territory. It is seriously debatable whether, in refusing to stay this proceeding pending the Saskatchewan action's ultimate conclusion, the learned motion judge gave "full faith and credit" to the judgment of the Saskatchewan Court of Queen's Bench in *Wuttunee*.

[21] This proposed appeal involves matters of importance not only in Ontario, but also on an inter-provincial scale and is important to the development of the law regarding the conduct of class proceedings. The *2005 Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues* offers important insight into the seriousness of the problem of overlapping classes in multi-jurisdictional class actions in this country. Inevitably, this problem will only become more prevalent as more provinces purport to have jurisdiction to certify national opt-out classes. Unless the resulting conflicts between parallel class actions on substantially the same subject matter in different provinces are resolved, as the Committee recognized, "the potential for chaos and confusion remains high."

[22] The need to develop jurisprudence with respect to parallel class actions must be viewed in light of the necessity of addressing parallel, overlapping proceedings in different provinces generally – an imperative that Lederman, J. recognized in *Molson Coors Brewing Co. v. Miller Brewing Co.* (2006), 83 O.R. 331 (Sup.Ct.). There is a greater risk of overlapping class actions than of individual actions given that class proceedings are brought by different representative plaintiffs or groups of plaintiffs seeking to represent the same absent national class members in respect of the same claims in different provinces.

[23] The motion for leave to appeal the decision to stay the proceeding meets the test under Rule 62.02(4)(b), and is granted.

Certification

[24] Merck also seeks leave to appeal the certification decision. In my view, Merck has failed to meet the test for leave to appeal and I would not grant leave to appeal on any of the grounds raised.

[25] Our Court of Appeal has said on more than one occasion that the decisions of judges who manage class proceedings are entitled to considerable deference: *Pearson v. Inco Ltd.*, [2005] O.J. No. 4918 (C.A.) at paragraphs 3 and 43. Absent matters of general principle or errors of law, a certification decision should not be interfered with by an appellate court. Cullity, J. has considerable experience managing class action proceedings and has been doing so for many years. In liberally construing class proceedings legislation, as he is required to do, he applied existing principles of law to the facts of the case facing him, facts which, in essence, were identical or similar to those facing Klebuc, C.J.S. who had no difficulty certifying the class action in Saskatchewan.

[26] In terms of the test for leave to appeal in Rule 62.02(4)(a) and (b), I see no conflicting decision by another judge on the matter involved in the proposed appeal, nor do I see any good reason to doubt the correctness of the decision in question. Further, I am not satisfied that the proposed appeal gives rise to matters of such importance that the granting of leave is warranted. The decision to certify may be important to Merck but, on this procedural and interlocutory motion, there is no issue of general public importance that requires the attention of an appellate court.

[27] I will address in turn each of the grounds upon which Merck seeks leave to appeal the certification order.

1. ***Forum non Conveniens***

[28] Merck submits that Cullity, J. should have considered whether Ontario would be the *forum conveniens* in which to certify the claims of non-residents whose claims have no real and substantial connection to the province.

[29] This issue was not raised before Cullity, J. and Merck has not provided any authority for the proposition that a court is obligated to consider *forum non conveniens* on its own initiative.

2. **Burden of Proof/Pure Economic Loss**

[30] Merck submits that Cullity, J. failed to apply the correct burden of proof, commensurate with the "same basis in fact" test set out by the Supreme Court of Canada in *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, in finding a sufficient connection between the common issues and each class member's claim to warrant certification. Merck also challenges certification as a common issue the question of whether class members are entitled to recover the amount, or part of the amount of the purchase price of Vioxx as damages. In certifying this issue, Merck submits, Cullity, J. allowed class members to seek damages for pure economic loss, despite the absence of any established harm, or increased risk of harm or injury.

[31] The law in Canada is clear that a certification motion is not intended to address the merits of the main action. The proceeding before Cullity, J. was a procedural motion, the focus of which was the form, and not the content of the action. Merck's arguments are ones that address the likelihood of success of the plaintiffs' action and are not tenable challenges to the correctness of Cullity, J.'s conclusions.

4. Waiver of Tort

[32] Merck submits that there is no evidence of a wrongful act on its part that rationally connects the plaintiffs on a class-wide basis to the purported waiver of tort common issues.

[33] Cullity, J. found that it was not certain that a pleading of waiver of tort as a cause of action would fail, and in doing so, he correctly applied existing legal principles: *Heward v. Eli Lilly*, [2007] O.J. No. 404 (S.C.J.), affirmed *Heward v. Eli Lilly*, [2008] O.J. No. 2610 (Div.Ct.). He correctly reasoned that Merck's arguments in respect of waiver of tort should not be determined at the pleadings stage, but instead are most appropriately left for determination at trial. This reasoning emphasizes the procedural nature of a certification motion and recognizes it as an inappropriate legal venue for argument on the waiver of tort doctrine.

[34] The law relating to waiver of tort remains uncertain. A proper determination on the issues in this area cannot be made without the benefit of a full evidentiary record. Such a record is not available on a certification motion. Because there was insufficient evidence before Cullity, J. to allow him to determine the issue, he correctly found that it was not plain and obvious that a waiver of tort claim would fail.

[35] I find no basis for interfering with the treatment of the proposed common issue dealing with waiver of tort. Cullity, J. appropriately narrowed the scope of this issue to allow for the possibility that a restitutionary remedy may be awarded with respect to only part of the revenue from the sale of Vioxx in Canada for the benefit of one or more subclasses of plaintiffs. Determining Merck's liability on a restitutionary basis requires an assessment only of Vioxx's fitness to achieve its intended purpose, of Merck's conduct given the extent of its knowledge of risk, and of Merck's revenues from sales of the drug. This analysis engages common issues and can be done on a class-wide basis.

5. Preferable Procedure

[36] Merck submits that individual issues relating to causation overwhelm any common issues that might exist and, as a result, a class proceeding is not the preferable procedure.

[37] In finding that certification was the preferable procedure, Cullity, J. engaged in the preferability analysis established by the courts of Ontario in finding that while individual issues existed, the resolution of the common issues would substantially advance the litigation, in the sense of determining the most critical questions raised in the action – questions relating to Merck's conduct in addressing claims of negligence, and to Merck's liability to account for revenues and profits. There was evidence to support this finding and I see no reason to dispute its correctness.

[38] The motion for leave to appeal the decision to certify the proceeding does not meet the test under Rule 62.02(4)(a) or (b), and is dismissed.

Disposition

[39] For the reasons outlined above, leave to appeal the order dismissing the defendants' motion to stay this proceeding is granted on the following issue:

> Did the certification motion judge err in not issuing a stay of proceedings pending the final disposition of an overlapping multi-jurisdictional opt-out class action previously certified in Saskatchewan?

[40] Leave to appeal the certification order is denied, as is the application to raise constitutional questions.

Costs

[41] The costs of these motions are reserved to the panel disposing of the appeal.

Bellamy, J.

DATE: November 24, 2008