

CITATION: *Charmley v Deltera Construction Limited*, 2010 ONSC 7153
COURT FILE NO.: 09-375391-00CP
DATE: 20101222

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Douglas Charmley, Nazaline Insanally, Frederic Nzeyimana and
Maurcen Molinnus, Plaintiffs/Moving Parties

Deltera Construction Limited, Defendant/Respondent

BEFORE: G.R. Strathy J.

COUNSEL: Ted Charney, for the Plaintiffs/Moving parties

Jain Peck, for the Defendant/Respondent

Ryan J. Coughlin, for the Third Party, Toronto Standard Condominium
Corporation No. 1806

DATE HEARD: December 10, 2010

ENDORSEMENT

[1] This is a motion for the certification of this action as a class action under s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "C.P.A.") The motion is not opposed and I find that it is appropriate to make the order sought. In the interest of judicial economy, these reasons will be brief.

Background

[2] This action arises out of an explosion and fire on March 19, 2009, in the electrical room of a condominium apartment and townhouse development located at 3650 Kingston Road in Toronto ("3650 Kingston").

[3] 3650 Kingston is a 9 storey high-rise and contains approximately 313 residential dwelling units, 180 locker units, and 245 parking units, along with 5 townhouse blocks containing 36 residential dwelling units and 70 above ground parking spaces.

[4] The plaintiffs were owners or occupiers of units in 3650 Kingston. They, and almost 500 other occupants, were evacuated from their homes in the middle of the night, many in their night clothes. It was almost three months before repairs were completed and the residents were able to

resume living in their units. Some went without access to their cars for extended periods of time. In the interim, they lived in motels and other temporary accommodations, without cooking and laundry facilities and without many other amenities of their lives at home. As a result of the incident, the plaintiffs claim that they, and other members of the proposed class, suffered personal injuries, emotional distress, damage to their property and other losses.

[5] The action was originally commenced against Toronto Hydro and Deltera Construction Limited ("Deltera"), a contractor alleged to have been responsible for the design and construction of the building. It was discontinued, on consent, against Toronto Hydro and the plaintiff is proceeding only against Deltera.

[6] The plaintiffs claim that their damages were caused by Deltera's negligence. The amended statement of claim alleges that the explosion was caused by drilling in the concrete foundation walls of the underground parking lot, ultimately impacting the main electrical conduit to the building and causing the explosion.

[7] Deltera has recently taken third party proceedings against Toronto Standard Condominium Corporation No. 1806 (the "Condominium Corporation"), which manages the condominium property and controls and administers the common elements and other assets. The third party claim alleges that the Condominium Corporation was negligent in, among other things, failing to advise Deltera of deficiencies in the building.

[8] The plaintiffs seek to represent a class composed of unit owners and occupiers described below.

Certification

[9] The *C.P.A.* is remedial legislation. It is to be given a generous, broad, liberal and purposive interpretation to meet the three goals of Ontario's class action regime: judicial economy, access to the courts and behaviour modification: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67 ("*Hollick*") at para. 15; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924 (C.A.) ("*Cloud*") at para. 37, leave to appeal to the S.C.C. refused [2005] S.C.C.A. No. 50.

[10] The language of section 5 of the *C.P.A.* is mandatory. The court is required to certify the action as a class proceeding if the following five-part test for certification has been met:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;
- (c) the claims of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

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- (e) there is a representative plaintiff who,
- (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[11] The certification motion is not meant to be a test of the merits of the action. It is a procedural motion that focuses on the form of the action rather than on whether the action is likely to succeed on the merits. The plaintiff must establish a minimum evidential basis for a certification order. It is necessary that the plaintiff show some basis in fact for each of the certification requirements, other than the requirement in s. 5(1)(a): see *Hollick* at para. 25. I will examine the proceeding having regard to each of the requirements of s. 5.

(a) Cause of action

[12] The test under s. 5(1)(a) is well settled and identical to the test under rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194. No evidence is admissible for the purposes of determining the s. 5(1)(a) criterion and all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proven. The pleading will be struck only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect: see *Cloud* at para. 41.

[13] The plaintiffs plead a cause of action against Deltera in negligence. They plead that Deltera owed them a duty of care, that it breached the duty and that they suffered damages as a result. This is a proper pleading of negligence and the plaintiffs have satisfied the cause of action requirement.

[14] The plaintiffs also claim declaratory relief:

- (a) a declaration that the defendant owed a duty of care to the class in relation to the design, construction, maintenance and repair of the building, including the underground parking lot at 3650 Kingston;
- (b) a declaration that the defendant breached the reasonable standard of care expected of it in relation to the design, construction, maintenance and repair of the of the building, including the underground parking lot at 3650 Kingston.

[15] I accept the submission that a declaratory judgment is an established remedy under Canadian law pursuant to s. 97 of the *Courts of Justice Act*, R.S.O 1990, c. C.43: see Lazar Sarna, *The Law of Declaratory Judgments*, 2nd ed. (Toronto: Carswell, 1988) at 5-9; Itzhak

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Zamir & Jeremy Woolf, *The Declaratory Judgment*, 3rd ed. (London: Sweet & Maxwell, 2002) at 3. The plaintiffs say that as a claim for a declaration is a cause of action, the plaintiffs may obtain a judgment for a declaration: *Smith v. National Money Mart Co.* (2007), 37 C.P.C. (6th) 171, [2007] O.J. No. 46 (S.C.J.) at paras. 22-25, leave to appeal refused [2007] O.J. No. 2160 (Div. Ct.); *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.), at paras. 41 and 49.

[16] I respectfully agree with the observations of Lax J. in *Glover v. Toronto (City)* (2009), 70 C.P.C. (6th) 303, [2009] O.J. No. 1523 (S.C.J.), at para. 23, that the pleading is superfluous in the sense that it adds nothing to the common issues. I accept the plaintiff's submission, however, that the plaintiff's entitlement to declaratory relief is an issue that can be addressed by the judge at the common issues trial, if necessary.

(b) Identifiable Class

[17] Section 5(1)(b) of the *C.P.A.* provides that there must be an identifiable class of two or more persons that would be represented by the proposed plaintiff. Class definition is critical because it identifies those who are entitled to notice, to relief if awarded, and who will be bound by any judgment or settlement. A class definition must be based on objective criteria. There must be some rational relationship between the class and the common issues: see *Hollick* at paras. 17, 19-20.

[18] The plaintiffs propose the following definition of the class:

...those persons, excluding Deltera Construction Limited and its officers, directors, servants or agents, who, on Thursday, March 19, 2009:

- (a) rented a unit [defined as a condominium unit, an apartment or townhouse or other usable space at 3650 or 3640 Kingston Road]; or
- (b) ordinarily resided in a unit; or
- (c) was present in a unit but was not ordinarily resident in that unit; or
- (d) owned or had an interest in property located in or on a unit; or
- (e) owned one or more units.

[19] The proposed class definition is appropriate. The class is clearly identifiable and is based on objective criteria. The definition enables potential class members to know whether they are members of the class and whether they should opt out.

(c) Common issues

[20] Section 5(1)(c) of the *C.P.A.* requires that the claims or defences of class members raise common, but not necessarily identical, issues of fact or law. It is self-evident that a claim of this nature will raise some issues of fact or law that are common and some issues that are individual to class members. In very general terms, the issues relating to whether Deltera was negligent will be common and the issues of the damages sustained by class members will be primarily, but not exclusively, individual issues. The common issues proposed by the plaintiffs are set out below.

[21] The common issues need only advance the litigation. This requirement has been described by the Court of Appeal “as a low bar”: see *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236, [2000] O.J. No. 4014 (C.A.) at paras. 40-42; *Cloud* at para. 52.

[22] The common issues question should be approached purposively. The underlying question is whether duplication of fact-finding or legal analysis will be avoided by a class proceeding: see *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63 at para. 39; *Cloud* at para. 51.

[23] *Common issue 1* asks, “Did the defendant owe a duty of care to the Class in relation to the design, construction, maintenance and repair of the building, including the underground parking lot at 3650/3640 Kingston Road, Toronto, Ontario?”

[24] *Common issue 2* asks, “Did the defendant breach the standard of care expected of it in relation to the design, construction, maintenance and repair of the building, including the underground parking lot at 3650/3640 Kingston Road, Toronto, Ontario, and if so, when and how?”

[25] Whether the defendant owed a duty of care, breached the applicable standard and was negligent involves a determination of issues of mixed fact and law. These common issues are rationally connected to the class members and to the causes of action asserted. The decision on each of these issues will be resolved by an examination of the defendant’s conduct.

[26] In a recent case, also involving an explosion in an apartment complex in Toronto, the court stated the common issues as: “Did Toronto Hydro owe a duty of care to the Class in relation to the design, operation, monitoring and maintenance of the hydro vault at 2 Secord? Did Toronto Hydro breach the standard of care expected of it in relation to the design, monitoring and maintenance of the Hydro Vault and if so, when and how?”: see *Kennedy v. Toronto Hydro-Electric System Ltd.* (23 April 2009), Toronto Court File No. CV-08361906CP (Ont. S.C.J.) (“*Kennedy*”) at para. 27.

[27] *Common issue 3* asks, “Can the damages of the Class be determined, in part, on an aggregate basis? If yes, what amount should the defendant pay, to whom and why?”

[28] Section 24 of the *C.P.A.* provides that a court may determine the aggregate or a part of a defendant’s liability to class members if monetary relief is claimed, if no questions of fact or law other than the assessment of monetary relief remain to be determined, and if the “aggregate or a part of the defendant’s liability can reasonably be determined without proof by individual class members.” As Goudge, J.A. said in *Cloud* at para. 70:

I also agree with Cullity J. that in a trial of these common issues, the claims for an aggregate assessment of damages and punitive damages are properly included as common issues. The trial judge should be able to make an aggregate assessment due to the breaches found, if this can reasonably be done without proof of loss by each individual member. Indeed this is consistent with s. 24 of the *Class Proceedings Act, 1992*.

See also *Markson v. MBNA Canada Bank* (2007), above.

[29] If there is a possibility that the preconditions of section 24(1) of the *C.P.A.* will be satisfied, an aggregate assessment should be considered as a common issue. Whether aggregate damages are ultimately to be awarded is for the trial judge to determine: see *Serhan Estate v. Johnson & Johnson et al.*, (2006), 85 O.R. (3d) 665 (Div. Ct.) at para. 139; *Vezina v. Loblaw Companies Ltd.* (2005), 17 C.P.C. (6th) 307, [2005] O.J. No. 1974 (S.C.J.) at para. 25.

[30] In *Kennedy*, at para. 27 of the order, the court also certified the following identical common issue: "Can the damages of the class be determined, in part, on an aggregate basis? If yes, what amounts should Toronto Hydro pay to whom and why?"

[31] *Common issue 4* asks whether the defendant should pay punitive damages to the class and if so, in what amount?

[32] The plaintiffs have properly pleaded a claim for punitive damages in paragraph 50 of the statement of claim. The resolution of this common issue will determine the issue of the defendant's liability for punitive damage to the class as a whole: see *Whiten v. Pilot Insurance*, [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19 at paras. 36, 68, 72; *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39 at para. 34. This issue is often included as a common issue: see *Cassano v. The Toronto-Dominion Bank* (2007), 87 O.R. (3d) 401, [2007] O.J. No. 4406 (C.A.) ("*Cassano*") at para. 72; *Peter v. Medtronic, Inc.* (2007), 50 C.P.C. (6th) 133, [2007] O.J. No. 4828 (S.C.J.) at para. 87.

[33] *Common issue 5*, which asks whether the defendant should pay pre-judgment and post-judgment interest, and, if so, at what annual interest rate, is similar to the issue certified by the Court of Appeal in *Cassano* at para. 72.

[34] *Common issue 6* asks whether the defendant should pay the costs of administering and distributing any monetary judgment and/or the costs of determining eligibility and/or the individual issues and if so, who should pay what costs, why, and in what amount. The Court of Appeal in *Cassano* approved a similar issue.

[35] *Common issue 7* asks whether, if the defendant is found liable to the class, it is entitled to contribution and indemnity from any third party, and to what extent? Counsel agreed that this is not an issue between the plaintiff and the defendant and it need not be included in the common issues.

[36] The plaintiffs have satisfied the s. 5(1)(c) requirement in respect of common issues 1 to 6 inclusive.

(d) Preferable procedure

[37] The Court of Appeal stated as follows in *Cloud* at para. 73:

[T]he preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable

method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members.

[38] The action can be certified if the resolution of the common issues will significantly advance the litigation, even if substantial individual issues are left to be resolved.

[39] The preferability analysis is to be conducted through the lens of the purposes of class proceedings – access to justice, judicial economy and behaviour modification. In this case, these goals will be satisfied. It is likely that many of the claims of class members are relatively modest and could not have been pursued on an economical basis in the absence of a class action. The action will promote judicial economy because liability for the entire class will only be determined once.

[40] While individual assessments of damages may be necessary, after the trial of the common issues, the court may create streamlined procedures to deal with quantum of damages: see *Cassano* at paras. 62-64. Section 25 of the *C.P.A.* confers a wide discretion upon the trial judge to determine how individual issues are to be dealt with, including the power to dispense with usual procedural steps. It is for the trial judge to determine how issues not determined at the common issues trial will be decided.

(c) Representative plaintiff

[41] Section 5(1)(e) of the *C.P.A.* requires that there be an adequate representative plaintiff, who does not have a conflict with the other class members on the common issues and who has provided a suitable litigation plan to move the action forward.

[42] I am satisfied that the proposed representatives (Douglas Charmley, Frederic Nzeyimana, and Maureen Molinnus)¹ are members of the class, that they have retained experienced counsel, that they have put forward an appropriate litigation plan and that they will adequately, competently and vigorously advance the claims of the class. They are personally motivated to do so. The plaintiffs' litigation plan sets out the steps in the litigation through the common issues trial including notice to class members. It also proposes a method to determine any remaining individual issues.

[43] At the certification motion, the litigation plan must necessarily be preliminary. Not all procedural details need be particularized. The purpose of the litigation plan is to assist the motions judge to determine whether the action is manageable and whether the goals of the *C.P.A.* will be served by certification of the action as a class proceeding.

[44] I find that the litigation plan sets out an efficient, manageable and workable procedure for the progress of this class proceeding. I do think that the litigation plan should make some provision for the role of class counsel following the resolution of the common issues. This is a matter that can be discussed at a case conference. Subject to that issue, I will approve the

¹ I was advised that the plaintiff Nazaline Insanally is not being proposed as a representative plaintiff.

litigation plan. It is not cut in stone and it will be reviewed and modified as necessary during the progress of the litigation.

Conclusion

[45] An order will therefore issue:

- (a) certifying this action as a class proceeding;
- (b) describing the class as set out above;
- (c) appointing Douglas Charmley, Frederic Nzeyimana and Maureen Molinnus as the representative plaintiffs;
- (d) stating that the nature of the claim asserted on behalf of the class is for damages for negligence;
- (e) stating that the relief sought by the class is damages;
- (f) stating that the common issues are as set out above;
- (g) directing that the members of the class be notified of the certification order in a manner to be set out in a further direction of the court, following discussion at a case management conference to be held within the next 30 days; and
- (h) directing that class members may opt out of the class proceeding in a manner to be set out in a further order of the court, following case management conference.



 G.R. Strathy J.

DATE: December 22, 2010