

James Durling et al - and – Sunrise Propane Energy Group Inc.

ENDORSEMENT

This question of scheduling was raised and argued as a formal motion. The plaintiffs seek an order that their motion to certify the proceeding should be heard first and, in particular, before the motion of the Teskey defendants for summary judgment under Rule 20. The Teskey defendants oppose the plaintiffs' motion and their counsel have submitted that the hearing of the motion for summary judgment should have precedence.

The resolution of this dispute requires an exercise of the court's discretion under section 12 of the CPA. The principles that govern the exercise of the discretion to determine whether motions under Rule 20 should be heard before certification is dealt with were recently considered in *Martin v AstraZenica Pharmaceuticals PLC*. Counsel on this motion were in agreement that considerations that were relevant to the exercise of the discretion in *Martin* are not present in this case. I am satisfied, however, that the general rule that motions to certify a proceeding commenced under the CPA should be the first to be heard is equally applicable here. I am also in agreement with defendants counsel that, as recognized in cases such as *Stone*, *Attis* and *Baxter*, there may be situations in which it is in the interests of a fair and expeditious determination of the action for priority to be given to defendants' motions under Rule 20 or Rule 21.

Although, prior to certification, the order that the defendants seek under rule 20 would not bind class members other than the plaintiffs, the grounds on which it is sought are such that the decision should apply equally to all class members. In contrast, an order for summary judgment in *Martin* would have turned on facts relating to individual issues affecting the validity of the plaintiff's claims and these issues would not necessarily have affected the claims of any other class members.

Despite this distinction between the two cases, I am satisfied that the appropriate exercise of the discretion under section 12 is for the general rule to be applied and for the hearing of the certification motion to have priority.

This is not a case like *Stone*, or *Punit* - discussed in *Martin* - in which the court could at this stage conclude that summary judgment would very likely be granted. On the motion for summary judgment the Teskey defendants will attempt to demolish all of the claims and causes of action pleaded against them. These include claims in negligence, nuisance and *Rylands v. Fletcher*. As well as the facts relating to the explosion, the conduct of the Teskey defendants in the past, the extent to which the Teskey corporations are operated as a single entity and the knowledge of their representatives and employees of the activities of the other defendants on the site in question will be relevant. Plaintiffs' counsel anticipate that they will wish to tender expert evidence on the cause of the explosion and other matters.

In responding to the motion, the plaintiffs will have an obligation to put their best foot forward and it will be presumed that the court hearing the motion will have a full evidential record before it. In effect, the plaintiffs will have to marshal - prior to certification - all the evidence relevant to the merits of the common issues arising out of the claims against the Teskey defendants. However, the parties are at present still at an early stage of gathering and analysing the facts relevant to the claims asserted on behalf of the class. Some of the evidence relating to the cause of the explosion, and the circumstances in which it occurred, is at present subject to a confidentiality order pending possible criminal charges and is not yet available to plaintiffs' counsel.

It appears, therefore, that, in contrast with many of the cases in which motions under Rule 20 or 21 have been permitted to precede certification, the defendants' motion does not involve discrete issues of law, or relatively simple questions of fact, so that it could be anticipated that it might be heard in the immediate or the very near future. When the delays inherent in appeals are taken into consideration, it is probably inevitable that the status of the proceeding under the CPA - and the procedural rights of class members and other defendants - would be left in abeyance, and remain in doubt, for a lengthy period. The delay would not only affect the rights of class members and the Teskey defendants inter se as the issue of certification vis a vis the other defendants would remain to be determined irrespective of the outcome of the motion for summary judgment.

As certification is not a test of the merits of the proceeding, the same delays are not likely to affect the hearing of the certification motion. In my judgment both the general rule that clarification of the status of a proceeding under the CPA should be the first step after its commencement, and the considerations referred to in section 12 of the CPA - fairness and an expeditious determination of the proceeding - indicate that the motion of the Teskey defendants should be deferred until after the motion for certification has been dealt with. In addition, as the plaintiffs at present anticipate that they will move for summary judgment on certain issues and as, in order to benefit the class, such a motion would be dependent on certification, there would likely be some economies in having such a motion and that of the Teskey defendants heard together, or one after the other, by the same judge.

Accordingly the plaintiffs' motion is granted. Costs maybe spoken to or if the parties would prefer to make their submissions in writing, those of the plaintiffs, and any parties other than the Teskey defendants, should be made within 10 days of the release of this endorsement. Counsel for the Teskey defendants will have a further 10 days in which to reply.

Released: *October 27/09.*

*Maurice Cullity J.*

CULLITY J.