CITATION: Romeo v. Ford Motor Co., 2017 ONSC 6674
COURT FILE NO.: CV-15-539855-00-CP
DATE: 20171108

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Mallory Dawn Outerbridge and Ashley Anne Wilke, Moving Parties (proposed interveners)

– and –

Rebecca Romeo, Joe Romeo, Diane Beland, Elyse Choiniere, Linda Goodman, and Tracy Corst., Plaintiffs

– and –

Ford Motor Company and Ford Motor Company of Canada, Limited, Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Vanessa Vuia and Anthony Tibbs*, for the Moving Parties

Theodore Charney, for the Plaintiffs

Hugh DesBrisay, for the Defendants

HEARD: November 6, 2017

ENDORSEMENT

[1] The Moving Parties are plaintiffs in a proposed class action in Saskatchewan that raises essentially the same claim as the within action. Both actions are proposed as multi-jurisdictional class actions on behalf of people in Canada who purchased or leased a Ford Focus or Ford Fiesta equipped with a dual-clutch transmission.

[2] The certification motion in the within action is scheduled to be heard in 10 days' time. The Moving Parties seek leave to intervene in that motion. The Plaintiffs were granted standing to intervene in the Saskatchewan certification motion, and the judge hearing the motion was aware of the timing of the Ontario proceedings. The Saskatchewan certification motion was heard in that province's Court of Queen's Bench roughly 6 months ago and is still under reserve.

[3] The Defendants take no position on the Moving Parties' request to intervene. They see this as a fight between two groups who are in any case their adversaries, and it does not matter to them whether they do battle with them in Ontario, Saskatchewan, or both.

[4] The Plaintiffs object to the intervention. They point out that the Moving Parties have not indicated anywhere in their materials what position they will take on certification if they are permitted to intervene. At the hearing, counsel for the Moving Parties made it clear that although his clients were keeping their options open in terms of a specific ruling sought, it could be anything from an outright stay of the within action to restrictions on the certification or the scope of the Plaintiff class in order to preserve the viability of the separate Saskatchewan proceeding.

[5] In the event of two or more proposed national class actions being commenced against the same defendants concerning the same subject matter, section 6(2) of Saskatchewan's *Class Actions Act*, SS c. C-12.01 ("SCAA") expressly allows for the out-of-province parties to participate in the Saskatchewan certification hearing. Section 6(2) provides a specific mandate for the court to determine whether it would be preferable for the Saskatchewan or the other province's proposed class action to resolve the issues. Counsel for the Moving Parties analogizes this to a carriage motion where two sets of plaintiffs and their respective counsel compete for priority in bringing the case. They point out that the Moving Parties here seek to impress on the court that there are other interests at play beyond those of the Plaintiffs in considering certification of the action.

[6] Although the Moving Parties complain about the lack of mutuality in the two provinces' legislative schemes, the fact is that under Ontario's *Class Proceedings Act*, SO 1992, c. 6 ("CPA") there is no parallel obligation on the court to take into account the position of out-of-province claimants in assessing a certification motion. Indeed, counsel for the Plaintiffs goes on to argue that it is nowhere part of this court's mandate to ensure that the Saskatchewan claimants are given the same procedural rights in Ontario as the Ontario Plaintiffs were given in Saskatchewan. They argue, correctly in my view, that it is for the respective legislatures of each province to determine on its own and for its own policy reasons how certification of a class action is to proceed.

[7] To be fair, the Moving Parties do not demand reciprocity for its own sake. Rather, they submit that this court's obligation under section 5(1)(d) of the CPA to assess whether "the class proceeding would be the preferable procedure for the resolution of the common issues" introduces the need to consider the position of the claimants in the out-of-province action. They say that just as section 6(3) of the SCAA provides factors to examine with respect to an out-of-province action that are similar to those considered in a carriage motion – e.g. ensuring the interests of all parties are served, avoiding the risk of irreconcilable judgments, promoting judicial economy, etc. – so, too, the preferability analysis mandated under section 5(1)(d) of the CPA requires the comparative virtues of the two proposed actions to be evaluated.

[8] The Plaintiffs oppose the intervention request on two grounds: a) that the Moving Parties have no standing to seek leave to intervene, and b) that in any case the Moving Parties have nothing to add to the Ontario proceeding and will not play a productive role in contributing to the analysis of the certification motion. I will address each of these in turn.

[9] As indicated, the Plaintiffs participated in the Saskatchewan proceedings as of right. Although there is no equivalent right under the CPA, counsel for the Moving Parties notes that

section 14(1) of the CPA mandates the court "to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason". Moving Parties' counsel goes on to point out that in fulfillment of this mandate, the section provides that "the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding."

[10] Counsel for the Moving Parties submits that since the named plaintiffs in the Saskatchewan case are by definition buyers of the relevant Ford vehicle parts, they are also included as members of the putative Plaintiff class in the within proceeding. They go on to argue that section 14(1) of the CPA thereby effectively allows the Saskatchewan representative plaintiff to participate in the forthcoming certification motion.

[11] Counsel for the Plaintiffs disagrees with this reading of section 14(1), as do I. It is the Plaintiff's view that section 14(1) envisions a class already being established such that the "proceeding" to which it refers is necessarily one that comes after certification has been pronounced. Plaintiffs' counsel states that prior to certification there is no class in existence at all, only a proposed one. Accordingly, no one person or group, including the named plaintiffs in the parallel Saskatchewan Court of Queen's Bench action, is "one or more class members" for the purposes of an individualized intervention.

[12] Plaintiff's counsel goes on to submit that not only is there no intervention rule on which the Moving Parties can rely, there are no principled grounds for their intervention either. He points out that section 14(1) of the CPA is in essence an access to justice rule, and that here there is no danger that the Saskatchewan class members (or any other class members, for that matter) will not be proposed members of the Ontario class if their certification motion is granted. There is a 100% overlap in proposed class members as between the Ontario and the Saskatchewan actions.

[13] That said, I would not want to dismiss the Moving Parties' intervention request on standing grounds. As a superior court of the province, this court has inherent jurisdiction to govern its own processes. This inherent jurisdiction is a broad one; indeed, it is "a concept whose nature has been described as 'so pervasive in its operation that it seems to defy the challenge to determine its quality and to establish its limits'": *Montreal Trust Co. v. Churchill Forest Industries (Man.) Ltd.*, [1971], 4 WWR 542, at para 15 (Man CA). quoting I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Current Legal Problems 23. It includes the power to set aside its own judgments, to appoint a receiver, to design fair procedures, to determine who is a proper party, and, generally, all "powers which are necessary to enable it to act effectively within [its] jurisdiction": *Connelly v. Director of Public Prosecutions*, [1964] 2 All E.R. 401, 409 (HL).

[14] While the court cannot exercise its inherent jurisdiction in a way that conflicts with the requirements of a statute or Rule of procedure, determining whether a party has standing to intervene in a certification motion does not conflict with any statute or rule. The parties are in agreement that Rule 13 of the *Rules of Civil Procedure*, which would ordinarily govern interveners, is inapplicable to a certification motion in an action governed by the CPA. With the exception of section 14(1), the CPA itself is silent on the question of interveners. In other words, there is no prohibition on a non-party having standing to intervene, and the court is at liberty to grant that standing if it is just and equitable to do so: *Montreal Trust*, *supra*, at para 18.

[15] The problem with the Moving Parties' request for leave to intervene is not their lack of standing – I would be willing to exercise the court's inherent jurisdiction to grant them standing to intervene if they otherwise qualified as proper interveners. Rather, the problem is with their potential contribution (or lack of contribution) to the certification motion. It is axiomatic that "[m]otions to intervene require consideration not only of the proposed intervenor's interest in the issue between the parties, but also the likelihood that the intervenor can make a useful addition or contribution to the resolution of the issues before the court without causing injustice to the parties": *Fairview Donut Inc. v. TDL Group Corp.*, [2008] OJ No 4720 (SCJ), at para 5.

[16] The Moving Parties have not wanted to commit themselves in this motion with respect to their position on certification should they be granted leave to intervene. However, it seems clear that their point will be to somehow give priority to the Saskatchewan action or to differentiate the Saskatchewan residents of the Plaintiff class from the other members of the class. As Lax J. put it in *Fairview Donut*, at para 9, these positions "will only serve to delay the determination of the issues and may serve to take the proceeding off into a tangent."

[17] It must be kept in mind that the Saskatchewan action has not been certified and is still under reserve some 6 months after being argued. Counsel for the Plaintiffs points out that the upshot of that is that the Moving Parties will of necessity be arguing that the Saskatchewan-based class members be treated differently than the other class members even though it is uncertain whether the Saskatchewan action will ever be certified. In other words, they will potentially be arguing for the exclusion of some part of the class from a claim in either jurisdiction. Once the stark reality of the Moving Parties' position is expressed in this way, it becomes apparent why counsel for the Moving Parties was reluctant to commit to a definitive position. The intervention is, effectively, aimed at potentially derailing the rights of a portion of the class rather than advancing them.

[18] If the Saskatchewan-based members of the class, or, for that matter, any other members of the class, wanted to throw in their lot with the Saskatchewan action rather than the within action, they can always act individually to opt out of the Ontario class. The opt-out provision of the CPA provides a complete remedy for those class members who might dissent from the proceeding being certified as a class action: *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 OR (3d) 535 (SCJ). That provision "should not be circumvented by granting intervenor status to putative class members who see matters differently from the proposed representative plaintiffs in a class action. This will not only cause undue delay and expense, but it is antithetical to the procedure contemplated by the legislature under the CPA": *Fairview Donut*, at para 11.

[19] Much like a late arriving carriage motion, the Moving Parties' position is "a disruptive request and not consistent with the scheme of the legislation": *Kidd v. Canada Life Assurance Co.*, [2011] OJ No 4751, at para 64 (SCJ). Their motion for leave to intervene is hereby dismissed.

[20] The Plaintiffs are entitled to their costs. Plaintiffs' counsel has submitted a Costs Outline seeking an all-inclusive amount of just over $12,000 on a partial indemnity basis. The Moving Parties' counsel has submitted a Costs Outline in which his clients, had they been successful, would have sought just over $14,000. These amounts are close enough to each other that I can conclude that the amount sought by the Plaintiffs is not more than the amount the Moving Parties could reasonably expect to pay in relation to this motion: *Rules of Civil Procedure*, RRO 1990, Reg. 194, Rule 57.01(1)(0.b).

[21] The Moving Parties shall pay the Plaintiffs costs in the amount of $12,000, inclusive of disbursements and HST. There shall be no costs ordered for or against the Defendants.

Morgan J.

Date: November 8, 2017