

**SUPERIOR COURT OF JUSTICE - ONTARIO
(DIVISIONAL COURT)**

RE: GUIDANT CORPORATION ET AL. v. ADRIEN LEFRANCOIS ET AL.

BEFORE: Justice Ferrier

COUNSEL: Harvey T. Strosberg, James Newland and Rebecca Case, for the
Respondents (Plaintiffs)

John A. Champion, Paul J. Martin and Sarah A. Armstrong, for the
Applicants (Defendants)

HEARD AT TORONTO: December 8, 2008

ENDORSEMENT

Ferrier, J.

[1] Endorsement on motion for leave to appeal from the order of Cullity, J. dated June 17, 2008, certifying this class action.

[2] Leave to appeal is denied for the following reasons.

[3] Leave to appeal motions must be considered in the context of the Court of Appeal's direction that deference is owed to those judges assigned to hear certification motions. In *Anderson*, the Court of Appeal states:

This is the first time this court has considered the certification of a class action and I am mindful of the deference which is due to the Superior Court judges who have developed expertise in this very sophisticated area of practice. The Act provides for flexibility and adjustment at all stages of the proceedings and any intervention by this court at the certification level should be restricted to matters of general principle.

Anderson v. Wilson (1999), 44 O.R. (3d) 673 (C.A.), leave to appeal refused [1999] S.C.C.A. no 476, p. 677

[4] McPherson J.A. subsequently repeated the principle that judges assigned to hear certification motions “develop an expertise which should be recognized and respected by appellate courts.”

Carom v. Bre-X Minerals Ltd. (2000), 51 O.R. (3d) 236 (C.A.) at pp. 247-8

[5] These principles were recently applied by Carnwath, J. when he denied leave in *Medtronic*.

Peter v. Medtronic Inc. [2007] O.J. No. 4828 (S.C.J.); leave to appeal refused [2008] O.J. No. 1916 (Div.Ct.); paras 2 -3

[6] Most recently in another defective medical product liability case where leave to appeal certification was denied, the Court said:

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, ...

Mignacca (formerly Tiboni) v. Merck Frosst Canada Ltd. (November 24, 2008), Toronto 503-08 (Ont.S.C.J.) at para 25

[7] Deference is also due where findings of fact or mixed fact and law are made. Findings of fact are subject to review on appeal only in the case of palpable and overriding error. On the certification decision Cullity, J. made the findings of fact and findings of mixed fact and law.

Waxman v. Waxman, [2004] O.J. No. 1765 (C.A.) paras 289-292, 296-7, 300

PLEADINGS

[8] Although the point was not pressed in oral submissions, the defendants in their factum argued that there are conflicting decisions concerning the scrutiny to be applied to the pleadings when considering section 5(1)(a) of the Class Proceedings Act. S.O. 1992 C.6 (the Act). Reference was made to *Hoffman v. Monsanto Canada Inc.* [2007] 6 W.W.R. 387 (Sask.C.A.) and *Cole v. Prairie Centre Credit Union Ltd.* [2008], 1 W.W.R. 115 (Sask. Q.B.). However, numerous authorities in the Ontario Court of Appeal and the Supreme Court of Canada hold that section 5(1)(a) will be satisfied unless it is plain and obvious that no cause of action is disclosed by the statement of claim. If the claims could, in law, succeed on the basis of the material facts pleaded, then this section is satisfied. Where the law is not fully settled, no finding to the contrary should be made at this stage. See for example:

Hunt v. Carey Canada Inc. [1990] 2. S.C.R. 959;

Hollick v. City of Toronto, [2001] 3 S.C.R. 158, para 25

Cloud v. Canada (Attorney General) (2004) 73 O.R. (3d) 401 (C.A.),
leave to appeal refused [2005] S.C.C.A. No. 50, para 41

[9] The issue has been addressed on at least two occasions by the Ontario Court of Appeal, and also by the Supreme Court of Canada.

Hollick v. City of Toronto, (*supra*)

Cloud v. Canada (Attorney General) (supra)

Kumar v. Mutual Life Assurance Co. of Canada (2003, 226 D.L.R. (4th)
112 (Ont. C.A.), para 36

[10] Thus in view of the clear line of authority in the Ontario C.A. and the S.C.C. it is not desirable that leave be granted. In this respect, the defendants fail on the second branch of sub rule (a) of the Rule 62.02(4).

[11] Furthermore, Cullity, J. considered *Hoffman* and correctly applied the law of this province. His decision in this respect is not open to “very serious debate”. The defendants fail on the first branch of sub rule (b) of Rule 62.02(4) (see *Ash v. Lloyd's Corp.*) (1992) 8 O.R. (3d) 282 at 284).

THE LITIGATION PLAN – SECTION 5 (1)(e)(ii)

[12] The Plan provides for a reference to determine individual issues of liability, causation and assessment of damages. The defendants argue that such a proceeding is not contemplated by sec. 25 of the Act when read in conjunction with Rule 54 and 55 of the Rules of Court. The defendants argue that the reference procedure is meant for cases where accounts must be taken, prolonged examination of documents or an investigation is required – which is not this case.

[13] Furthermore, argue the defendants, such a procedure is inappropriate to deal with issues of liability in complex cases such as this. It is said to be unfair to the defendants.

[14] Dealing first with the correlation between section 25 and Rules 54 & 55, the following are the relevant provisions:

Section 25

Individual issues:

25. (1) When the court determines common issues in favour of a class and considered that the participants of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,
- (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
 - (b) appoint one or more persons to conduct a reference under the rules of the court and report back to the court; and
 - (c) with consent of the parties, direct that the issues be determined in any other manner. 1992, c. 6, s. 25(1)

Direction as to procedure

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose achieving procedural conformity. 1992, c. 6, s. 25(2)

Idem

- (3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, is so doing, the court may,
- (a) dispense with any procedural step that it considers unnecessary; and
 - (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate. 1992, c. 6, s. 25(3)

Rule 54

54.01 Rules 54 and 55 apply to references directed,

- (a) under rules 54.02 or any other rule; and
- (b) under a statute, subject to the provisions of the statute

54.02 (1) Subject to any right to have an issue tried by a jury, a judge may at any time in a proceeding direct a reference of the whole proceeding or a reference to determine an issue where,

- (a) all affected parties consent;
- (b) a prolonged examination of documents or an investigation is required that, in the opinion of the judge, cannot conveniently be made at trial; or
- (c) a substantial issue in dispute requires the taking of accounts.

(2) Subject to any right to have an issue tried by a jury, a judge may at any time in proceeding direct a reference to determine an issue relating to,

- (a) the taking of accounts;
- (b) the conduct of a sale;
- (c) the appointment by the court of a guardian or receiver, or the appointment by a person of an attorney under a power of attorney;
- (d) the conduct of a guardianship or receivership or the exercise of the authority of an attorney acting under a power of attorney; or
- (e) the enforcement of an order

Rules of Civil Procedure, R.R.O. 1990

[15] The above noted submissions of the defendants ignore the provisions of Rule 54.01(b). The provisions of the Act prevail over the rules. The Act provides that a reference may be directed when the court considers that individual class members may be required to participate in order to determine individual issues.

[16] It was clearly within Cullity, J's discretion to approve a plan which includes provisions for a reference.

[17] In any event, the defendants position has been negated by the Ontario Court of Appeal in *Webb v. 3584747 Canada Inc.* (2004) 69 O.R. (3d) 502, and *Cussano et al v. Toronto-Dominion Bank* (2007) 87 O.R. (3d) para 64 leave to appeal refused [2008] S.C.C.A. No. 15.

[18] In *Cassano*, Winkler, J. for the Court of Appeal, reaffirmed the broad discretion conferred on the trial judge in section 25 to determine how individual issues are to be dealt with, including dispensing with usual procedural steps, including the directing of a reference and directing the procedures which will govern the reference.

[19] There is thus no reason to doubt the correctness of the decision of Cullity, J. in giving effect to section 25 of the Act in this case.

[20] *Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board* (2006) 79 O.R. (3d) 81 (C.A.) is not a conflicting decision. Ford was not a class action and the reference there was not under section 25(1)(b). There are no conflicting decisions.

[21] The defendants fail on this point under both subparas (a) and (b) of the Rule 62.02(4).

PREFERABLE PROCEDURE: SECTION 5(1)(d)

[22] There are several examples of certification in cases of alleged failed medical devices, as well as other products liability cases involving personal injuries, referred to in the factum of the Plaintiffs.

[23] Furthermore, in at least two previous cases, the litigation plans included provisions for references: See *Mignacca v. Merck Frost Canada Ltd.* [2008] O.J. No. 2996, leave to appeal denied November 24, 2008; *Peter V. Medtronic* [2007] O.J. No. 4828, leave to appeal denied [2008] O.J. No. 1916.

[24] This issue of fairness has been canvassed thoroughly in earlier cases of products liability with personal injury, including those cases where references were provided for. I note the obvious – that litigation plans, including those with provisions for references, bring with them a full range of flexibility and possible revision. They embody full powers of discretion to be exercised to protect the procedural fairness rights of all parties.

[25] The defendants have not established the criteria in either subpara (a) or (b) of Rule 62.04 in reference to this issue.

[26] Accordingly, leave to appeal is denied.

[27] Costs to the plaintiff fixed at \$12,500.00 including disbursements and G.S.T.

[28] Costs of the abandoned motion for leave to appeal the costs order fixed at \$500.00 including disbursements and G.S.T.

"Ferrier, J."
~~_____~~
Ferrier, J.

DATE: January 6, 2009.