CITATION: David v. Loblaw, 2018 ONSC 198
COURT FILE NO.: CV-17-586063-00CP
DATE: 20180109

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Marcy David, Plaintiff

– AND –

Canada Bread Company, Limited, Orupo Bimbo, S.A.B. De C.V., George Weston Limited, Loblaw Companies Limited, Weston Foods (Canada) Inc., Empire Company Limited, Sobeys Inc., Metro Inc., Wal-Mart Canada Corp., Wal-Mart Stores, Inc. and Giant Tiger Stores Limited, Defendants

BEFORE: EM Morgan J.

COUNSEL: *David Wingfield and Nicole Marcus*, for the Plaintiff

Jean-Marc Leclerc and Mohsen Seddigh, for the Plaintiff in Breckon v Loblaw Companies Limited (Court File No. CV-17-00005494-00CP)

Robert Russell, Davit Akman, and Danielle Ridout, for the Defendants, George Weston Limited, Loblaw Companies Limited, and Weston Foods (Canada) Inc.

HEARD: January 8, 2018

MOTION RE LOBLAW'S CONSUMER CARD PLAN

[1] This motion is brought by the Plaintiff at the outset of a proposed class action. The claim alleges that the Defendants have conspired together in a price fixing scheme regarding the retail price of bread. The Plaintiff proposes representing a consumer class of purchasers of bread from the Defendants, or any of them, since 2002. This motion challenges the terms of a card plan that Loblaw has put in place for consumers which, Plaintiff's counsel contends, is misleading and improperly deals with putative class members.

[2] A number of other proposed class actions have been commenced around the province and county in connection with the alleged price fixing scheme for bread. Counsel for one of those actions, Breckon v Loblaw Companies Limited (Court File No. CV-17-00005494-00CP), attended at the hearing of this matter and made brief submissions generally supportive of those of the Plaintiff.

[3] The Defendants, George Weston Limited, Loblaw Companies Limited, and Weston Foods (Canada) Inc. ("Loblaw"), have been pro-active in attempting to address the price fixing allegations. For one thing, they have cooperated with the federal Competition Bureau in its investigation of the alleged price fixing conspiracy. Indeed, it would appear that it was Loblaw that brought the entire matter to the Competition Bureau's attention and that has provided much

of the information on which the Bureau has obtained search warrants and which has become known to the public. Also, as required by Ontario securities legislation, Loblaw has made public disclosure of its participation in the price fixing arrangement and has estimated its exposure for the purposes of informing the financial markets.

[4] In conjunction with all of this, Loblaw has offered consumers a card – referred to as a "gift card" by the media, although this label is not favored by Loblaw itself – worth $25 in products purchased at a Loblaw store. As counsel for Loblaw explains it, a consumer need only go to a special website created for this program and declare him or herself to be a past purchaser of bread in order to be eligible for the $25 card. There is also a paper application form available for the same purpose.

[5] Loblaw issued a press release on December 19, 2017, just after the documentation leading to the initial search warrant executed by the Competition Bureau was unsealed, in which it expressed regret for its involvement in the price fixing scheme and announced the card program as a way of making amends to its customers. In an market analysts' call that same day, three members of Loblaw board indicated that the company predicts that between 3 and 6 million people will take up the card offer, and that the cost of this program – estimated at between $75 to $150 million, depending on customer uptake – will be offset against any eventual damages award or settlement reached in the class actions relating to the price fixing allegations. The press release specifically states, however, that the card program should not be treated as an estimate of damages.

[6] Loblaw spokespeople have refrained from describing the card offer as a goodwill gesture, but the press has covered it that way. And, indeed, Loblaw' insistence that the cost of the card program is not an estimate of damages, and that the card is not a substitute for damages if and when they are awarded in the class actions, lends itself to this description. Along these lines, counsel for Loblaw is specific in characterizing the card as an expression of remorse and an effort to regain the confidence of customers after having done something the company regrets, and not as a strategy to forestall any eventual damage payments.

[7] The card program, however, is not akin to a Christmas turkey giveaway that the retailer decided to do in order to regain customer goodwill and nothing further. It is specifically related to the class action liability that it foresees down the road.

[8] To that end, the website on which one signs up for the cards, as well as the paper application form used by those who prefer not to sign up online, contains an advisory as to how the card program relates to any eventual award or settlement. The forms refer specifically to the class actions, and recommend that customers obtain legal advice either from Plaintiff's counsel in one of the actions or from independent counsel. The forms go on to indicate that those who sign up for the card remain eligible for "incremental compensation" – a phrase that might seem cryptic to some consumers, but which signals that the $25 value of the card will be deducted from any compensation awarded to class members.

[9] Most importantly, the web and paper applications contain a form of Release, in the following terms:

> In exchange for this twenty-five (25) Canadian Dollar Loblaw Card you hereby release and forever discharge Loblaw ("Loblaw" includes Loblaw Companies Limited, its parent corporation George Weston Limited and their affiliates as well as all of their current and former officers, directors, and employees) from any and all claims or causes of action (of whatever nature or kind) for damages, costs or other relief that you may have relating to or otherwise in connection with any overcharge on the price of packaged bread in the period between January 1, 2002 and March 1, 2015 to the extent of twenty-five dollars.

[10] Counsel for the Plaintiff submits that the court has jurisdiction under section 12 of the *Class Proceedings Act, 1992*, SO 1992, c. 6 ("CPA"), to intervene in respect of Loblaw' card program and, in particular, the operation of this Release. That section allows the court to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate."

[11] Although Plaintiff's counsel concedes that imposing a restriction on communication by a Defendant to putative class members would be an extraordinary step, *Smith v National Money Mart*, [2007] OJ No 1507, he contends that it is warranted under the circumstances. Specifically, he points out that "[w]hile defence counsel may contact putative class members pre-certification to gather evidence, they may not make misleading statements or try to convince them to act adversely to their interest": *Lundy v Via Rail Canada Inc.*, 2012 ONSC 4152, at para 38. It is the Plaintiff's view that the card program is misleading in that it comes with hidden, or obscured, strings attached – i.e. the Release and all that it implies with respect to a consumer giving up rights otherwise available as a class member – and thus is not in the best interest of those who sign up for it.

[12] Counsel for Loblaw counters that the test for court intervention at this stage is a stringent one. Only where a Defendant's communication to putative class members amounts to "misinformation, a threat, intimidation, coercion, or is made for some other improper purpose aimed at undermining the process" does the court have jurisdiction to intervene: *De Muelenaere v Great Gulf Homes Ltd.*, 2015 ONSC 7442, at para 37. Here, Loblaw's counsel points out, there is no evidence that Loblaw's approach is designed to avoid a class action: *Blair v Toronto Community Housing Corp.*, 2011 ONSC 4395, at para 71. Likewise, he contends, there is no indication that signing up for the Loblaw card constitutes an "abuse of bargaining power" or a "grossly unfair or improvident bargain" such as would make it unconscionable: *Norberg v Wynrib*, [1992] 2 SCR 224, 256.

[13] Indeed, counsel for Loblaw describes the card program as a "social good" in that Loblaw has taken early steps to remediate the loss to consumers: *Blair*, *supra*, at para 25. It is Loblaw's position that the card program was put together specifically to ensure that the consumer not only gets something of value, but that it comes with the fullest possible disclosure. The company therefore asks the court to see the program as emblematic of its efforts at responsible corporate citizenship: *Lundy*, *supra*, at para 9.

[14] This position assumes that, in general, a court will "not interfere with what otherwise would be the normal rights of putative class members to conduct their affairs as they see fit, to protect

their own interests, and to seek their own advice without interference by the court": *Great Gulf, supra*, at para 39. That is, that absent any elements of unconscionability, "[a]dult, intelligent, competent, fully informed putative class members, perhaps assisted by independent legal advice or independent legal representation" can legitimately make up their minds whether or not to accept the offer represented by the card in all of its terms: *Lundy, supra*, at para 9. Loblaw submits that since "[o]ne cannot assume an inequality of bargaining power exists class wide simply because the agreement is between a consumer and a corporation", *Barwin v IKO Industries Ltd.*, 2015 ONSC 5944, at para 33, there is nothing in the record that should prompt the court to intervene against the free will of each consumer who signs up for the card.

[15] Loblaw's counsel submits that the form of Release included in the application for the card does no more than reflect the setoff that what would in any case occur by operation of law. Far from undermining the enforceability of the card arrangement, as Plaintiff's counsel contends, Loblaw sees the express Release as strengthening it. Counsel for Loblaw specifically points to section 120(1) of the *Courts of Justice Act*, RSO 1990, c. C.43, which provides that, "If a defendant makes a payment to a plaintiff who is or alleges to be entitled to recover from the defendant, the payment constitutes, to the extent of the payment, a release by the plaintiff...of any claim that the plaintiff...[has] against the defendant." As Loblaw sees it, the Release language on the application form merely makes this explicit to the non-legally trained consumer.

[16] This view, of course, depends on how one perceives the card program. That is, if it is strictly an approach aimed at winning back consumer confidence – which is the primary way in which Loblaw has sought to portray the card program – then section 120(1) would not be applicable at all. A section 120(1) setoff would only come into play if the card was, indeed, an advance on an ultimate damages award or settlement payment in the class actions. In that case, setoff might apply to prevent double recovery for those who accepted the card: see *Pro-Sys Consultants Ltd. v Microsoft Corporation*, [2013] 3 SCR 447 paras 39-40. A gratuitous gift to the customer, unrelated to the class action litigation or potential settlement thereof, would not have this effect.

[17] Even if the card arrangement is seen as a pre-certification form of settlement, or partial settlement, there is nothing inherently wrong with that. As indicated, courts will not typically intervene in such arrangements absent an indication of misrepresentation or misinformation: *Great Gulf, supra*, at para 38. Loblaw states that its Release ensures that there is no such misunderstanding on the part of the consumer. In its view, by making explicit that which the law makes implicit, and by adding an advisory about the existence of the class action law suits and informing the reader of the need to obtain legal advice, Loblaw has done what is expected of it to fully inform any person signing up for the $25 card.

[18] It is hard to argue with this position. Loblaw has a right to engage in a marketing campaign, and it equally has a right to reach out to consumers to settle part of its exposure in class action litigation. As long as they have not misled anyone – and the explicit language of the application form and accompanying Release is appropriate and serves to counter any misinformation that the consumer may have gleaned from press coverage of the card program – both of these aims are acceptable and can be combined into one package. Loblaw contends that the consumer who chooses to take up the card will only benefit. For example, if an ultimate settlement or damages award is less than $25 per person, the card holders will not have to refund to Loblaw any balance;

and if an ultimate settlement or damages award is more than $25 per person, the card holders will have gotten part payment well in advance and can use it in the very way they themselves chose – i.e. by spending it in a Loblaw store.

[19] The usual grounds for intervening in a pre-certification arrangement between a Defendant and putative class members do not exist here. I find no oppressive conduct by Loblaw, and although there might be some confusion in the market about whether the $25 card is truly a free gift, that confusion is more from the media and 'hype' around the card than from Loblaw itself. The disclosure contained in Loblaw' actual application form and information package is ample and fair.

[20] The one thing that gives me pause is with respect to what will happen if and when an ultimate settlement of the class action is reached. If that occurs, the court will be in a position to exercise its supervisory jurisdiction and review the settlement under section 29 of the CPA. Indeed, since the class actions regarding the price fixing of bread appear to be cropping up in multiple jurisdictions, across Canada courts may have a mandate to examine the fairness and adequacy of the proposed settlement: see *Dabbs v Sun Life Assurance* [1998] OJ No 1598, at para 11 (Gen Div); *Killough v Canadian Red Cross Society*, [2007] BCJ No.1262 (BC SC); *Rideout v Health Labrador Corp.*, [2007] NJ No 292, at para 138 (Newfl'd and Lab SC); *Sparvier v Canada (Attorney General)*, [2006] SJ No 752 (Sask QB); *Landry v Syndicat du transport de Montréal*, [2006] JQ No 3043, at para 31 (QSC).

[21] At that stage, it may become relevant to consider whether it is appropriate that part of any settlement payment by Loblaw be composed of a $25 card that can only be used at a Loblaw store. That type of settlement – often dubbed a 'coupon settlement' – has been subject to some criticism in the class action literature: see Catherine Piché, *Fairness in Class Action Settlements* (McGill University, 2010), at pp. 59-64; Christopher R. Leslie, "The Need to Study Coupon Settlements in Class Action Litigation," 18 Geo. J. Legal Ethics 1395, 1396–98 (2005). Indeed, Judge Richard Posner has characterized the use of coupons as currency by a Defendant as "a warning sign of a questionable settlement": *Saltzman v Pella Corporation*, 606 F.3d 391 (7th Cir. 2010). There is an argument that since corporate behavior modification is one of the important goals of class action litigation, see *Hollick v Toronto (City)*, [2001] 3 SCR 158, at para. 27, coupons issued by a Defendant – which benefit the Defendant by providing increased marketing and profit opportunities – are in some instances not an appropriate settlement device.

[22] That is not to say that a coupon settlement is in all cases out of the question. These types of arrangements have been approved where they are seen to be in the best interest of the class as a whole – in particular where they are but one of several forms of compensation and are a useful way of increasing the value of the settlement: *Mortillaro v Cash Money Cheque Cashing Inc.*, [2009] OJ No 2904 at paras 15-16 (SCJ). Every case, of course, turns on its own facts. Thus, the eventual approval of a settlement will depend on "the class size, the complexity of the transactions and their idiosyncratic nature": *Nantais v Easyhome Ltd.*, [2005] OJ No 5805 (SCJ).

[23] At this stage, I am not in a position to know what, if anything, an eventual settlement will entail. It is therefore premature to rule on the enforceability of the Release or the applicability of s. 120(1) of the *Courts of Justice Act*. A setoff such as envisioned by Loblaw might or might not be appropriate down the road, but it is simply too early to tell. As Loblaw's counsel points out,

"The remedy [of declaratory relief] is not generally available where the controversy is not presently existing but merely possible or remote": *Operation Dismantle Inc. v The Queen*, [1985] 1 SCR 441, at para 31, quoting Fager, *The Declaratory Judgment Action* (1971), at p. 5.

[24] Just as it is too early to grant the relief sought by the Plaintiff and declare the Release to be unenforceable and s. 120(1) to be inapplicable, it is equally too early to declare the Release to be enforceable and for the setoff envisioned by Loblaw to apply. That decision must be reserved for a settlement approval hearing under the CPA.

[25] When taking up the card offer, the consumer is advised that the card may ultimately replace $25 worth of settlement value, but that is not for certain. On the other hand, Loblaw has advised of its intention to offset the cost of the card against any eventual award or settlement, but that is equally not for certain. Both Loblaw (like the other Defendants) and the consumer/class members will have the opportunity of presenting any eventual settlement for approval by the court at the time, and that will be based on the fairness, reasonableness, and adequacy of the settlement overall. While the Release is fair and not misleading at this stage, it does not bar substantive review of any class action settlement at the end of the litigation process.

[26] With that *caveat* in mind, the Plaintiff's motion is dismissed. There will be no costs of this motion for any party.

[redacted]

Morgan J.

Date: January 9, 2018