CITATION: Austin v. Bell Canada, 2018 ONSC 4018
COURT FILE NO.: CV-18-590105-00CP
DATE: 20180629

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: LESLIE AUSTIN, Plaintiff

AND:

BELL CANADA, BELL MEDIA INC., EXPERTECH NETWORK INSTALLATION INC., and BELL MOBILITY INC., Defendants

BEFORE: Justice Glustein

COUNSEL: *Jonathan Ptak, Brittany Tovee, and Matthew Baer*, for the Plaintiff

Dana Peebles and Atrisha Lewis, for the Defendants

HEARD: June 25, 2018

REASONS FOR DECISION

Nature of hearing and overview

[1] This hearing addresses a scheduling issue in this proposed class action.

[2] The defendants seek to bring a motion to stay the proposed class action (the "Stay Motion") in order that the matter be dealt with by the Office of the Superintendent of Financial Institutions ("OSFI").

[3] At a case conference on April 20, 2018, the defendants asked the court to direct that the Stay Motion be heard before the certification motion. The plaintiff, Leslie Austin ("Austin") opposed that request and asked the court to direct that the Stay Motion be heard together with the certification motion.

[4] The scheduling issue raised at the case conference was adjourned so that counsel could make oral and written submissions at a hearing before the court.

[5] For the reasons that follow, I agree with Austin's position and I direct that the Stay Motion be heard together with the certification motion.

Facts

[6] Austin is a member of the Bell Canada Pension Plan (the "Plan"). In January 2018, Austin issued the proposed class action. The claim arises out of the alleged improper calculation of the rate of indexation under the Plan.

[7] Austin claims that the defendants breached (i) fiduciary and trust duties, and (ii) contractual obligations, which Austin claims the defendants owed to him and other members of the proposed class.

[8] The Plan is regulated by OSFI.

[9] Both the court and OSFI have jurisdiction to interpret the Plan.

[10] Prior to the case conference, the defendants' counsel contacted counsel at OSFI on an *ex parte* basis (as permitted under the OSFI process) and:

(i) "shared the statement of claim",

(ii) advised OSFI that the defendants "believed that it would be more appropriate for the Superintendent of Financial Institutions (the Superintendent) to consider this matter than to proceed by way of class action" and,

(iii) "asked [OSFI] to confirm that it would take jurisdiction over the issue at hand if asked to do so".

[11] The above content of the communications was set out in a letter dated April 18, 2018 from the Director, Supervision (Private Pension Plans Division) (the "Director") of OSFI to the defendants' counsel (the "OSFI Letter"), which was copied to the plaintiff's counsel.

[12] In the OSFI Letter, the Director stated that:

(i) OSFI is willing to decide "whether indexing is being calculated in accordance with the terms of the pension plan";

(ii) If the plaintiff would "submit a complaint to the Superintendent detailing their concerns", "the Superintendent would initiate a process to determine whether the complaint has merit"; and

(iii) "If the Superintendent were to decide that the pension plan was not, in fact, being administered in accordance with its terms, the Superintendent could ask the parties to remedy the situation informally, or, if necessary, could issue a direction of compliance against the administrator, the employer, or any other person".

[13] At the case conference, the defendants asked the court to direct that the Stay Motion be scheduled before the certification motion.

[14] Austin's counsel opposed the direction sought. Austin requested that the Stay Motion and the certification motion be heard together.

[15] After the case conference, the defendants' counsel provided an "update" to OSFI by letter dated April 23, 2018, which was copied to Austin's counsel. The defendants advised OSFI that if successful on the scheduling issue, they would submit at the Stay Motion "that a

process undertaken by OSFI, which has specialized knowledge, is an efficient and proper way to resolve the issue involving the interpretation of the Bell Canada Pension Plan".

[16] By letter dated May 3, 2018, Austin's counsel advised OSFI that:

> Austin takes the position that "[p]roceeding by way of a class action will provide the means for all the claims and remedies for all class members to be adjudicated efficiently, in one proceeding, which will bind all class members and the defendants, and provide appeal remedies to either party, if needed" since:
>
> (a) "The statement of claim alleges breaches of contract and fiduciary duty in respect to the defendants' conduct";
>
> (b) "The claims are based on principles of common law, contractual interpretation, and equity, which are squarely within the courts' expertise"; and
>
> (c) "Furthermore, the remedies sought include damages, which are in the jurisdiction of the court to award".

[17] The issue before me is whether the Stay Motion should be scheduled before the certification motion, or heard with the certification motion.

The applicable law

[18] I rely on the following legal principles that govern directions as to whether a proposed preliminary motion should be heard before the certification motion:

(i) "[T]he question of scheduling and the order of proceedings must of necessity be decided on a case by case basis depending on the peculiar circumstances of the matter". Sections 12 and 13 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*") "specifically confer a broad discretion on the class proceedings judge to determine these procedural questions" (*Attis v. Canada (Minister of Health)*, [2005] O.J. No. 1337 (S.C.J.) ("*Attis*"), at para. 10);

(ii) "As a matter of principle, the certification motion ought to be the first procedural matter to be heard and determined" [...] "That said, however, there are circumstances where it is useful, indeed in some cases necessary, that preliminary motions be heard in advance of the certification motion" (*Attis*, at paras. 7 and 8);

(iii) In a class action, litigation by instalments should be avoided whenever possible, in order to avoid multiple rounds of proceedings in court. In *Garland v. Consumers' Gas Co.*, 2004 SCC 25 ("*Garland*"), the court adopted the comments of McMurtry C.J.O. from the appellate decision that "[b]efore employing an instalment approach, it should be considered whether there is potential for such a procedure to result in multiple rounds of proceedings through various levels of court. Such an eventuality is to be avoided where possible, as it does little service to the parties or to the efficient administration of justice" (*Garland*, at para. 90);

(iv) In *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2012 ONSC 1924, Perell J. relied on *Garland* to hold that a leave motion under ss. 138.3 and 138.8 of the *Securities Act*, R.S.O. 1990, c. S.5, should be heard together with (and not before) the certification motion;

(v) In *Holmes v. London Life Insurance Co.*, [2000] O.J. No. 3621 (SCJ) ("*Holmes*"), Cumming J. accepted the defendants' submission that the applicant's application under the *Insurance Companies Act*, S.C. 1991, c. 47 and Rule 14 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 be heard before the certification motion.

Cumming J. held that the court should consider "all factors relevant" to scheduling issues, including "the three underlying policy objectives of the *CPA* in addressing the sequencing of events in the proceeding", *i.e.* ensuring that, by hearing a pre-certification motion, (a) "facilitating access to justice for claimants is not compromised", (b) "the objective of judicial efficiency is furthered" and (c) "the modification of otherwise wrongful behaviour is not compromised" (*Holmes*, at paras. 10, 11, 14, and 15);

(vi) In *Cannon v. Funds for Canada Foundation*, 2010 ONSC 146 ("*Cannon*"), Strathy J. (as he then was) set out a list of "non-exhaustive" factors relevant to the exercise of the court's discretion to direct the hearing of a pre-certification motion (*Cannon*, at para. 15) (quoted *verbatim*):

> (a) whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined;
>
> (b) the likelihood of delays and costs associated with the motion;
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> (c) whether the outcome of the motion will promote settlement;
>
> (d) whether the motion could give rise to interlocutory appeals and delays that would affect certification;
>
> (e) the interests of economy and judicial efficiency; and
>
> (f) generally, whether scheduling the motion in advance of certification would promote the 'fair and efficient determination' of the proceeding (s. 12); and

(vii) There is no case law before the court supporting the pre-certification scheduling of a stay motion when the stay sought is not based on whether a court has jurisdiction, but instead based on whether the court in a class action is the preferable jurisdiction in comparison to a regulatory proceeding. To the contrary, the preferability of jurisdiction issue has been decided in the context of the certification motion.

In *AIC Limited v. Fischer*, 2013 SCC 69 ("*Fischer*"), the court held that a class proceeding was the preferable procedure as compared to the Ontario Securities

Commission. The court set out five questions to address the overall comparative preferability analysis (*Fischer*, at paras. 27-38).

In *Chapman v. Benefit Plan Administrators,* 2013 ONSC 3318 ("*Chapman*"), Conway J. held, on a certification motion, that it was not preferable that the issue of benefits reduction be dealt with by OSFI rather than in a class proceeding since "[t]his litigation is not, as the defendants suggest, simply about allocation of Plan funds among different groups of beneficiaries. The litigation is about the conduct of the defendants and whether they acted improperly, to the detriment of the Plan beneficiaries" (*Chapman*, at paras. 72-74).

In *Mortson v. Ontario*, [2004] O.J. No. 4338 (S.C.J.) ("*Mortson*"), Cullity J. also addressed the preferability of a regulator's jurisdiction as part of the certification analysis, holding that "the existence of the procedure under the [*Pension Benefits Act*, R.S.O. 1990, c. P. 8] does not oust the jurisdiction of the court in cases of alleged breach of trust or fiduciary duty" (*Mortson*, at para. 72).

Cullity J. accepted the plaintiffs' submissions that "recourse to the court's jurisdiction is preferable in this case where the plaintiffs' claims relate more to the [plan administrator's] duties as a fiduciary than to the operation of the [pension plan] pursuant to the PBA…Questions relating to the scope, and implications, of the Board's fiduciary obligations are …not within any presumed area of expertise, or competence, of the Superintendent or the FSCO tribunal and are pre-eminently matters that should be determined by the court in its equitable jurisdiction" (*Mortson*, at paras. 72-73).

Analysis

(a) The positions of the parties with respect to the whether the court or OSFI is the preferable jurisdiction to address any common issue

[19] In the present case, there is no dispute that the both the court and OSFI have jurisdiction to determine whether indexation under the Plan was proper.

[20] On the issue of whether the preferable jurisdiction is the court or OSFI, the parties' positions are stated in their separate letters to OSFI, as I summarize above.

[21] In addition, in his written submissions for the present scheduling hearing, Austin raises concerns about the process before OSFI. Austin relies on alleged weaknesses in the OSFI process with respect to (i) a lack of procedure to lead evidence, (ii) no appeal process, (iii) no hearing, and (iv) no ability to testify or give evidence under oath or test evidence through cross-examination. Austin submits that the OSFI process is "informal and opaque" and further submits that under the OSFI process (footnotes omitted):

> The plaintiff will have no chance to file expert evidence, cannot control the process and will not have access to the procedural safeguards of a court. The only procedural safeguard in place is that no direction for compliance may be made unless certain parties are given a 'reasonable opportunity to make written

representations'. The legislation provides no right of reply, no right to call evidence – expert or otherwise, no right to an oral hearing, no right to review the submissions of the other parties and no ability to control the process or shape the case.

[22] At this scheduling hearing, I make no findings on the merits of the parties' positions on preferability of jurisdiction. That issue can only be determined when raised before the court with an evidentiary record and legal submissions.

(b) Analysis of the factors set out in the case law

[23] I rely on the *Cannon* factors and find that those factors support scheduling the Stay Motion together with the certification motion.

(i) Whether the Stay Motion will dispose of the entire proceeding or substantially narrow the issues to be determined (*Cannon*, at para. 15(a))

[24] The result of the Stay Motion will not "dispose of the entire proceeding" or "substantially narrow the issues to be determined".

[25] Section 5(1)(d) of the *CPA* requires that "a class proceeding would be the preferable procedure for the resolution of the common issues". Consequently, the common issues need to be determined to assess preferability and, as such, the factual record in respect of the preferabilty issue is inextricably linked and overlaps with the other elements of the certification test. Carving out the issue of preferability on a "stand-alone" basis would not dispose of the entire proceeding or narrow the issues to be determined. The issue of preferability ought to be determined within the context of the certification motion.

[26] The approach proposed by Austin to schedule the Stay Motion with the certification motion is consistent with the approach taken by the courts in *Fischer*, *Chapman*, and *Mortson.* In those cases, the courts considered the preferable jurisdiction between the courts or regulatory bodies under s. 5(1)(d) of the *CPA*. As in the present case, the preferability analysis in those cases did not "dispose of the entire proceeding" or "substantially narrow the issues to be determined" (as per the comments of Strathy J. in *Cannon*).

[27] The present case is unlike the decisions relied upon by the defendants. In both of those cases, the court scheduled pre-certification motions on the basis that the result of the motion would dispose of the entire proceeding or substantially narrow the issues to be determined.

[28] In *1523428 Ontario Inc. v. The TDL Group Corp.*, 2018 ONSC 1180 ("*TDL*"), Morgan J. scheduled a motion to strike before certification, when the claim on the merits against all but one of the defendants would be addressed by the motion.

[29] In the present case, no decision on the merits is sought by the Stay Motion, and there is no dispute that the court has the jurisdiction to determine the issues raised in the class action.

[30] In *Holmes*, the defendants proposed that the application which the applicant had already brought be heard prior to the certification motion. Cumming J. held that the "central issue" would be determined at the application and scheduled it prior to the certification motion (see *Holmes*, at para. 13).[1]

[31] In the present case, the Stay Motion addresses the same preferability issue to be determined by the court on the certification motion. It neither disposes of the entire proceeding, nor decides the merits, nor substantially narrows the issues to be determined.

[32] For the above reasons, I find that this *Cannon* factor supports scheduling the Stay Motion with the certification motion.

(ii) Whether the Stay Motion will lead to delays and costs associated with the motion or give rise to interlocutory appeals and delays that would affect certification (*Cannon*, at paras. 15(b) and (d))

[33] As in *Cannon*, I find that there is considerable risk in the present case of costs and delay arising from an appeal.

[34] The defendants submitted in their factum that they "will waive their appeal rights on the Stay Motion, until the certification motion is decided", so as not to delay certification.

[35] However, Austin understandably has not taken that position. He raises significant issues as to the fairness of the process before OSFI, as I discuss above. Further, in his factum, Austin submits that he intends to file affidavit evidence about (i) his personal experiences with OSFI, (ii) access to justice, and (iii) other concerns with the OSFI process.

[36] Consequently, it is almost certain that if the Stay Motion were granted, Austin would appeal the decision, in order to protect the rights he asserts would be infringed under the OSFI process.

[37] Conversely, if the Stay Motion was heard with the certification motion, there would be only one appeal from all issues raised with respect to certification, including the issue of preferability of jurisdiction.

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[1] *Holmes* ultimately did not proceed by way of determining the merits of the application prior to certification. The litigation stalled and new counsel was appointed, with the court on the carriage decision concluding that Justice Cumming's decision on the order of the proceeding was not binding on the new representative plaintiff (*Holmes v. London Life Insurance Co.*, [2006] O.J. No. 5275 (SCJ), at para. 5).

The case was eventually certified. The defendants relied on Justice Cumming's decision to argue that a class action was not the preferable proceeding. Justice Leitch rejected this argument and commented that "the Cumming Ruling was a consequence of the fact that an application had been commenced and as a result the respondent could not proceed under Rules 20 and 21" (*Jeffrey v. London Life Insurance Co.*, [2008] O.J. No. 837 (SCJ), at paras. 123-24).

[38] For these reasons, scheduling the Stay Motion before the certification motion leads to the risk of litigation by instalment. Under the defendants' approach, a decision in their favour on the preferable jurisdiction issue, on a pre-certification Stay Motion, would then have to be resolved by appellate courts. Further, if an order granting the stay was reversed by an appellate court, the matter would then be sent back to the motions court to address certification issues, which could then result in a subsequent appellate process. This would lead to the result cautioned against by the court in *Garland*.

[39] Consequently, I find that the concern of delay arising from interlocutory appeals is a factor under *Cannon* that supports scheduling the Stay Motion with the certification motion.

(iii) Whether the outcome of the motion will promote settlement (*Cannon*, at para. 15(c))

[40] I agree with Austin's submission that the outcome of the Stay Motion will not promote settlement.

[41] The Stay Motion will only determine whether OSFI or the courts will interpret the Plan. The choice of the preferable jurisdiction (the only issue which could be resolved by the Stay Motion) does nothing to narrow the issues or assist the parties in arriving at a determination of whether indexation under the Plan was proper or whether the defendants breached fiduciary, trust, or contractual duties in their interpretation of the Plan.

[42] Consequently, the outcome of the Stay Motion will not promote settlement.

(iv) Whether the stay motion would promote the interests of economy and judicial efficiency and promote the fair and efficient determination of the proceeding (*Cannon*, at paras. 15(e) and (f))

[43] The Stay Motion is premised on the defendants' submission that OSFI is a preferable forum in which to address the interpretation of the Plan. However, preferability under s. 5(1)(d) of the *CPA* requires the court to consider the same issue.

[44] The determination of the Stay Motion (based on preferability) would require the court to consider the same evidence about the OSFI process that would have to be considered under s. 5(1)(d) of the *CPA*. Further, since Austin intends to file affidavit evidence about his personal experiences with OSFI, access to justice and other concerns with the OSFI process, that evidence will overlap with other elements of the certification test[2] and should be assessed in the context of the certification motion. The entire evidentiary record is best considered as a whole (unlike in cases such as *TDL* where the evidentiary context which would be relevant under the *CPA* is not required under a Rule 21 motion).

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[2] (including the common issues requirement under s. 5(1)(c) of the *CPA*, since s. 5(1)(d) requires that "a class proceeding would be the preferable procedure for the resolution of the common issues")

[45] The defendants submit in their factum that they "wish to have this dispute resolved quickly and cost efficiently" and that OSFI will provide a "faster; binding, less expensive disposition". However, the defendants led no evidence that the OSFI process would be quicker and more efficient than the determination of a class action.

[46] There is no evidence about the length of time which OSFI would take to investigate, reach conclusions, obtain court orders to enforce, and complete any other steps in the process.

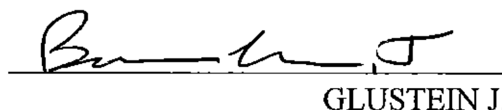
[47] On the other hand, there are scheduled motion dates in April 2019 before the court in which all of the certification issues (not just preferability of jurisdiction) can be dealt with efficiently in a class proceeding, and possibly earlier dates for a summary judgment motion if the parties can agree on a process (an issue discussed at the present hearing).

[48] Again, Austin's approach is consistent with the decisions in *Fischer*, *Chapman*, and *Mortson*, all of which addressed the issue of preferability between regulatory and civil proceedings as part of the certification analysis. The parties in those cases did not litigate the preferability of jurisdiction issue by instalment through a pre-certification stay motion. Rather, as in the present case, when there is no dispute that both the court and the regulatory body have jurisdiction to decide the issue raised in the claim, the courts considered the preferability issue as part of the certification process.

[49] Consequently, these factors under *Cannon* support scheduling the Stay Motion with the certification motion.

Order

[50] I deny the defendants' request to schedule the Stay Motion prior to the certification motion. I direct that the Stay Motion be heard together with the certification motion. The parties agreed that there would be no costs ordered in relation to this scheduling issue.



GLUSTEIN J.

Date: 20180629