CITATION: Bell Mobility Inc., 2013 ONSC 7529
DIVISIONAL COURT FILE NO: 462/13
COURT FILE NO.: CV-12-452867-CP
DATE: 2013/12/16

SUPERIOR COURT OF JUSTICE - ONTARIO
DIVISIONAL COURT

RE: CELIA SANKAR v. BELL MOBILITY INC., et al.

BEFORE: Justice Moore et al.

COUNSEL: *Steve Tenai* and *Jeremy Devereux*, for the Defendant/Applicant

Louis Sokolov and *Jordan Goldblatt*, for the Plaintiff/Respondent

HEARD: December 5, 2013

ENDORSEMENT

Moore J.

[1] The defendant, Bell Mobility Inc. ("Bell Mobility") brings this application for leave to appeal portions of the October 4, 2013 order of Belobaba J. certifying this action as a class proceeding.

[2] More specifically, Bell Mobility contests the order certifying the claims of the plaintiff, Celia Sankar ("Sankar"), for certain common law breaches of contract as alleged in the statement of claim; certifying common issues A1, A2 and A3 with respect to the above contract claims; and, in the alternative, certifying a class that is overly broad.

[3] Bell Mobility confines its leave application to the general breach of contract claim and does not appeal the order certifying the breach of contract claims relating to the gift card regulation claims and related common issues. Nor does it question the order declining to certify the unfair practices claims.

[4] The defendant, Bell Canada Enterprises Inc., having been dismissed from the action by order dated May 22, 2013, is not a party to this application.

[5] In the result, regardless of the outcome of this application, there will be a certified class action going forward in this matter.

[6] The certification order followed upon lengthy, focused and compelling reasons for decision that this court welcomes and will afford appropriate deference to, given the specialized expertise and extensive experience of the certification motion judge.

[7] During the course of oral submissions on this application, the court was advised that substantially all of the issues and evidence briefed and argued before the certification motion judge was revisited here. I have no reason to doubt that and it was not denied by counsel for Bell Mobility. It must be remembered though that this application is not a hearing de novo but rather, a narrowly focused opportunity for Bell Mobility to meet specific burdens established by the Rules of Civil Procedure in order to succeed.

[8] Rule 62.02(4)(a) and (b) establishes that onus by stating:

> (4) Leave to appeal shall not be granted unless,
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> (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
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> (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.[1]

[9] For the reasons that follow, I am not persuaded that the application should succeed on either ground; accordingly, leave shall not be granted.

[10] The parties concede that the test is stated in two distinctive parts, each with two conjunctive criteria. Failure to establish the applicability of either criteria to a part is fatal to the application of that part.

[11] It is also common ground here that the Class Proceedings Act[2] is remedial legislation that must be liberally construed in order to give effect to its purposes.[3] The test for leave to appeal is to be applied rigorously in these applications.[4]

[12] Lederer J. explained the analytical process and purpose of these applications in terms I adopt. He said:

> The need for care in the analysis is underscored by a consideration of the nature of the *Class Proceedings Act*, 1992. It is "entirely procedural". The *Class Proceedings Act,* 1992 provides the court with a procedural tool to deal efficiently

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[1] R.R.O. 1990, Reg. 194, r. 62.02(4).
[2] 1992, S.O. 1992, c. 6,
[3] *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 (CanLII) paras. 74-77.
[4] *Griffin v. Dell Canada Inc.*, [2009] O,J, No. 3438 (Div.Ct.) at para. 35.

> with cases involving large numbers of interested parties, as well as complex and, often, intertwined legal issues, some of which are common and some of which are not. Certification is a fluid, flexible procedural process. Certification is not a ruling on the merits. The certification is not final. It is an interlocutory order and it may be amended, varied or set aside at any time. While it is not intended that defendants be compelled to confront, as class proceedings, actions which are frivolous or inappropriate to the purpose, it is equally clear that certification is not to be treated as an impediment to the action being brought as a class proceeding where it is appropriate and the preferable mechanism for resolving the dispute. The *Class Proceedings Act*, 1992 provides for "flexibility and adjustment at all stages of the preceding".[5]

[13] I am also alive to and accept the views of Corbett J. that:

> One reason to refuse to grant leave to appeal to the Divisional Court is that appellate review is available later, on a full record, after trial. Often it will be neither "important" nor "desirable" to consider an issue on an interlocutory appeal when that same issue may be appealed on a final basis.... Extensive interlocutory appeals in civil cases inevitably cause further delay and cost in a system that is already slow and expensive.... The focus of a motion for leave to appeal an interlocutory decision to the Divisional Court is on the decision and not the reasons. If the decision is correct, even if there may be concerns about aspects of the reasons, leave ought not to be granted...6

[14] These general comments are well known in these matters and explain, no doubt, why relatively few applications for leave to appeal decisions of certification judges are granted.

[15] Here, Bell Mobility submits that there are conflicting decisions on matters involved in the proposed appeal. It points to cases that, on the factual record before the court, were not certified. Its principal point of concern is that success for one class member must mean success for all and all members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.[7] Bell says that this requirement cannot be met in this case. I disagree.

[16] Clearly, the certification motion judge was alive to this concern and to the applicable law on topic. Bell Mobility has failed to establish that the underlying decision in this case stands in conflict with other cases. The application of legal principles here mirrors that demonstrated in the cases referenced by Bell Mobility. The result of other cases, driven by application of such principles to a very different factual record is not relevant to my consideration of whether to unleash appellate machinery here.

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[5] *Barwin v. IKO Industries Ltd.*, [2013] O.J. No. 2592 at para. 5
[6] *Silver v. IMAX Corp.*, [2011] ONSC 1035, at paras. 11 & 12.
[7] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] S.C.J. No. 57 S.C.C., at para 108.

[17] Although the motion certification judge made findings of fact against those urged upon him by Bell Mobility, that is something that fell within his discretion to do and forms no basis upon which to establish that his decision is out of step with other decided cases.

[18] Further, Bell Mobility has not established, in my opinion that it is desirable that leave should be granted. It says that departure from prior authorities in certifying a class action by certifying multiple legally unconnected causes of action and in certifying a cause of action in breach of contract when the terms of the contract are dependent on individual and varying representations made to each class member, renders the degree of commonality required to justify a class proceeding non-existent. As a result, it insists that the decision has far reaching implications and should be reviewed by the Divisional Court.

[19] The underlying bases for this conclusion are each grounds, if made out, for this court to conclude that there is reason to doubt the correctness of the decision. As such, they are not matters to be considered as criteria relevant to rule 62(4) (a); to conclude otherwise would deprive the first criteria of rule 62(4) (b) of relevance.

[20] Bell Mobility has not demonstrated that the matters at issue in this case are of such general importance, beyond the immediate interests of the parties, that it is desirable to grant leave.[8]

[21] Turning now to rule 62(4) (b) issues, I begin with the first criteria and consider whether Bell Mobility has established that there is good reason to doubt the correctness of the order in question. Bell Mobility has not persuaded me to form that opinion.

[22] It asserts that the allegations in the statement of claim do not describe breaches of a common law contract that can support a claim for damages at all. Bell Mobility likens the claims as pleaded to misrepresentation claims in that they assume that representations were made to class members after the contracts were made.

[23] Sankar insists and the certification judge found that the test, at the certification stage, is that the claim should be allowed to proceed unless it is plain and obvious that it cannot succeed, a very low hurdle.

[24] The certification motion judge considered the systemic practices of Bell Mobility to withdraw funds from customer accounts after the "expiry date"[9] to form an allegation capable of supporting a breach of contract claim. Assuming the facts as pleaded are true, he determined that the breach of contract action clears the s. 5(1) (a) hurdle and added that as challenging as the common issues trial judge's job may be, he was unable to say that the contractual claim is plainly and obviously doomed to fail and stands no chance of success.[10] He went on to say that it is important to remember that the defendant does not dispute that it had a systemic and class-wide

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[8] *Sirron Systems Inc. v. North America Construction (1993) Ltd.*, [2011] O.J. No. 6153, at para. 8.

[9] A term not defined on the phone card or elsewhere in Bell Mobility electronic or other documents available to class members.

[10] Reasons for Decision, at paras. 35 and 36.

practice of assigning expiry dates one day after the end of the "active period." It is these systemic practices that will be examined at the common issues trial, not any individual representations.[11]

[25] I am not persuaded that there is good reason to doubt the correctness of the certification judge's order to allow the action to proceed forward on the breach of contract claim.

[26] Bell Mobility argues that common issues cannot be resolved in a manner common to all class members as each will have different factual backgrounds. It says that the overall complexity of the common issues is so great that class certification ought not have been granted and, in any event, the trial judge will be left with an un-manageable factual matrix to sort out and that will result in a terrible waste of judicial resources. I disagree.

[27] The certification motion judge specifically and appropriately addressed these concerns by saying:

> ... I agree with the plaintiff that even though the defendant's practices, communications, and methods of notification varied and at one point changed during the time period in question, they were not haphazard or random but systemic and uniform. The various "differences" over the time period in question have been organized and charted by the plaintiff as shown below. Using the example set out in the right-hand column, and relating it to the two time periods set out in the left-hand column, one can readily, compartmentalize the practices, the communications and the delivery methods.[12]
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> Just as the plaintiff has organized the "permutations" on the charts above, the common issues judge, with the assistance of counsel, will generate his or her own compartments showing the systemic and uniform practices within each compartment that arguably affected the members of that particular sub-class. The resulting chart or spread sheet will show commonality within the compartments. The task will be challenging, to be sure, but not impossible.[13]

[28] Further, when considered against the Supreme Court's most recent pronouncement on whether the claims of class members raise common issues in *Pro-Sys*[14], I am not persuaded that there is reason to doubt the correctness of the certification order in this case.

[29] Finally, there is the matter of whether the proposed appeal involves matters of such importance that, in my opinion, leave to appeal should be granted.

[30] Bell Mobility insists that this matter may involve a great many class members, numbering over 1 million, and that the expiry date issue has been the subject of consumer complaints for some time and of a recent study involving phone card consumers.[15]

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[11] *Ibid*, at para. 73.
[12] *Supra*, at para. 71
[13] *Supra*, at para. 75.
[14] *Supra*, at paras. 106 through 1113

[31] It adds that the certification order raises a crucial issue with broad implications to class actions regarding the degree of variance in the circumstances of putative class members that can properly be addressed as a common issue.

[32] Bell Mobility has fallen short of establishing its onus to establish that this proposed appeal involves matters of such importance as to warrant consideration on appeal. There is no suggestion in the evidence that this case will be attracting the interest of or be considered important by people other than the parties.

[33] Further, at this stage of the action, the most significant concern is one relating to the state of the pleadings in the action and not the potential outcome of the case. Pleadings issues do not generally and do not in this case in particular transcend the interests of the parties and do not constitute matters of such importance under rule 62.02 that leave should be granted.[16]

[34] In the result, this application is denied and dismissed with costs to the respondent in amounts to be agreed upon or fixed by me. Counsel have agreed upon all but one issue of costs and may resolve that one yet. If they do not, they may contact me through the trial coordinator to schedule a conference call to determine the most efficient and cost effective manner by which to resolve any remaining costs issues.

J.P.M. Moore J.

Moore J.

DATE: 16 December 2013

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[15] Decision, *supra*, at paras. 3 & 6.
[16] *Economical v. Fairview*, 2011 ONSC 7535, at para. 14.