CITATION: Witham v. FCA Canada Inc., 2018 ONSC 7703
COURT FILE NO.: CV- 17-567691-CP
DATE: 20181228

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

SHANE WITHAM and ROBERT MAGINNIS

Plaintiffs

and

FCA CANADA INC., FCA US LLC, ROBERT BOSCH INC., ROBERT BOSCH GMBH and ROBERT BOSCH LLC

Defendants

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: Justice Edward P. Belobaba

COUNSEL: *David Sterns, Daniel E. H. Bach and Mohsen Seddigh* for the Plaintiffs

Rob Bell and Rebecca Shoom for the Proposed Defendant Scarsview Motors Ltd.

Peter Pliszka and Zohaib Maladwala for the FCA Defendants

Nicole Henderson for the Defendant Robert Bosch Inc.

HEARD: December 21, 2018

PRE-CERTIFICATION PLEADINGS MOTION

[1] The plaintiffs bring this proposed class action against the FCA defendants (i.e. Fiat Chrysler Automobiles) and the Robert Bosch defendants for damages relating to the emissions control "defeat device" that was allegedly designed, manufactured and

installed in certain diesel automobiles that were purchased or leased by the plaintiffs and putative class. The certification motion has not yet been scheduled.

[2] This pre-certification pleadings motion has two parts. The first is non-controversial: the plaintiffs wish to replace Shane Witham with Michael Magnaye. Messrs. Maginnis and Magnaye will be put forward as the representative plaintiffs when the certification motion is argued. This first part of the motion is unopposed and easily granted.

[3] The second part of the motion asks that Scarsview Motors, a Toronto-area FCA dealer, be added as a defendant to this action. Mr. Magnaye purchased a diesel Jeep Grand Cherokee (one of the impugned vehicles) from Scarsview. The plaintiffs intend in due course to move for the certification of a defendant class consisting of all FCA dealers in Canada that sold or leased the diesel vehicles in question and for the appointment of Scarsview as the representative defendant for this defendant dealers' class.

[4] From the plaintiffs' perspective, if the action is certified as a class proceeding, the targets will be the individual FCA and Bosch defendants and the FCA-dealers defendant class. The plaintiffs ask that Scarsview be added as a defendant, the style of cause be accordingly amended and leave be granted to allow the plaintiffs to file a fresh as amended statement of claim.

[5] Scarsview Motors resists this part of the motion on various grounds and has filed the affidavit of its vice-president, Sudhir Chopra. The plaintiffs ask that this affidavit be struck.

Decision

[6] For the reasons set out below, the plaintiffs' motion is granted in its entirety, with one qualification.

[7] The Chopra affidavit adds nothing of value at this stage of the proceeding but it will not be struck. Instead, the affidavit is deferred and may be refiled by Scarsview for further consideration at the certification stage of this proceeding. The evidence about Scarsview's unwillingness to act as a representative defendant, the alleged conflicts of interest or the business prejudice that Scarsview may sustain if appointed representative defendant for the defendant class is best considered at the motion for certification, not on a pleadings motion.

Analysis

[8] The plaintiffs seek leave to file a fresh as amended statement of claim that, amongst other things, claims against Scarsview on the basis of negligence, negligent misrepresentation, breach of express and implied warranties and unjust enrichment. Each of these causes of action is properly pleaded and focuses on Scarsview as the seller of the

impugned vehicles – that is, not as an agent of the manufacturers but as a principal in its own right. Contrary to Scarsview's submission, the causes of action are not untenable. Further, if Scarsview is not added as a defendant, the plaintiffs and proposed class risk losing certain "implied warranty" protections under provincial consumer protection legislation.

[9] Counsel for the FCA defendants advised the court that FCA would not turn on its dealers to escape liability. However, as the plaintiffs point out, FCA did draw the following distinction between itself and its dealers in its responding certification material:

> Neither FCA Canada nor FCA US sells vehicles to retail consumers. Rather, the Class Vehicles were sold by FCA US to FCA Canada. FCA Canada then sold the Class Vehicles to authorized FCA dealerships in Canada. *All authorized FCA dealerships in Canada are independently owned and operated businesses, unrelated to FCA Canada.* After purchasing the Class Vehicles from FCA Canada, those dealerships then sold or leased the Class Vehicles to consumers. *FCA Canada was not a party to any contracts relating to the sale or lease of new Class Vehicles to consumers by these independently owned dealerships.* [Emphasis added]

[10] If it turns out, as this litigation proceeds, that privity of contract becomes important, the proposed class may have no remedy for the alleged misrepresentations unless the FCA dealers are parties to this action. It follows, under rule 5.04(2), that Scarsview should be added as a necessary party "unless prejudice would result that could not be compensated for by costs or an adjournment."

[11] As already noted, the plaintiffs' intention is to bring a motion in due course to certify not only the plaintiffs' class action but also a defendant dealers' class action under s. 4 of the *Class Proceedings Act*[1] ("CPA") and have Scarsview appointed as the representative defendant. If it is appointed representative defendant, says Scarsview, the time and attention required will be "prohibitively expensive" and "detrimental to business" and will amount to an uncompensable prejudice.

[12] I reject this submission. There is nothing in the evidence, apart from Scarsview's bald assertion, that the obligations of a representative defendant in the context of this action - where defence counsel stands ready to assist - would in fact be "prohibitively expensive" or "detrimental to business". Even if such business impact evidence was forthcoming, there is nothing to suggest that any such impact could not be remedied with an appropriate costs award.

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[1] *Class Proceedings Act,* 1992, S.O. 1992, c. 6.

[13] The case law is clear that the "prejudice" referred to in the pleading rules:

> [i]s something more than the prejudice of having to defend the action or incur additional costs. The prejudice must be such that it would be unfair to now respond to the claim even if it would have been legitimate in the first instance ... The defendant must show that the amendment of the original pleading creates irremediable prejudice ... .[2]

[14] There is no evidence of any irremediable prejudice. There is nothing unfair in adding Scarsview as a defendant at this stage of the proceeding.

[15] Scarsview's remaining submissions, about its unwillingness to act as a representative or about certain alleged conflicts of interests that may materialize, are premature and should be advanced at the certification motion. Scarsview is forewarned, however, that a mere unwillingness to act as a representative defendant may not be enough to avoid appointment. As a leading textbook on class action law notes:

> For an order certifying the proceeding and appointing a representative defendant, it is not necessary that the representative defendant be willing to act in that capacity.[3]

[16] But again, this a matter for the certification hearing.

[17] A final comment. The certification of a defendant class and the appointment of a representative defendant under s. 4 of the CPA is still somewhat of a rarity in Canadian class action law. The applicable law is very much in the early stages of development. All the more reason, in my view, why core certification issues under s. 5 of the CPA, such as causes of action or preferable procedure or the suitability of the representative defendant, should be decided on a proper record *at certification* – and not on a motion to amend pleadings or add a party defendant.

[18] If the costs incurred prove to be unreasonable or excessive because, as Scarsview suggests herein, the plaintiffs are disingenuously pursuing a defendant dealers class in circumstances where it is unlikely that the dealers will ever materialize as genuine defendants, the court will always be open to the submission that costs should be awarded at an elevated level.

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[2] *Plante v Industrial Alliance Life Insurance Co.* 2003 CarswellOnt 2961 (S.C.J. Master) at paras. 34 and 37.

[3] Winkler, Perell, Kalajdzic and Warner, *The Law of Class Actions in Canada* (2014) at 43, citing applicable case law including *Berry v Pulley* (2001) 197 D.L.R. (4th) 317 (S.C.J.) at para. 53.

[19] But, again, all of these issues should take decided in the context of the certification motion or at some later stage of the class proceeding, not on a pleadings motion.

Disposition

[20] The plaintiffs' pleadings motion is granted in its entirety with one qualification. The Chopra affidavit is not struck and may be refiled at the certification motion, as explained above.

[21] Order to go accordingly.

[22] The plaintiffs ask for $20,000 in costs. Scarsview suggests something in the range of $5000 to $15,000. I find it fair and reasonable in all the circumstances to fix costs at $15,000 all-inclusive, with $10,000 payable forthwith by Scarsview to the plaintiffs and $5000 payable in the cause of the upcoming motion for certification (as it pertains to Scarsview).

[23] I am obliged to counsel for their pragmatic submissions and overall assistance.

Justice Edward P. Belobaba

Date: December 28, 2018