Citation: Dalhuisen v. Maxim's Bakery
2002 BCSC 528

Date: 20020411
Docket: S012584
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

**CHRISTOPHER DALHUISEN by his Guardian ad Litem
COR DALHUISEN as Representative Plaintiff**

PLAINTIFF

AND:

MAXIM'S BAKERY LTD.

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE BURNYEAT

(IN CHAMBERS)

Counsel for the Plaintiff: D.A. Klein

Counsel for the Defendant: L.C. Boulton

Date and Place of Hearing: April 4, 2002
Vancouver, B.C.

[1] The Representative Plaintiff applies for the following Orders and Declarations pursuant to the ***Class Proceedings Act***, R.S.B.C. 1996, c.50 ("***Act***"): (a) this proceeding be certified as a class proceeding; (b) the Plaintiff Class be comprised of all persons who were residents of British Columbia on the day they consumed baked goods that were tainted with Salmonella Enteritidis which was manufactured, distributed or sold by the Defendant and who suffered personal injury as a result of consuming the tainted baked goods; (c) that members of the Plaintiff Class may opt out of this action by delivering a signed “Opt-Out Form” to counsel for the Plaintiff; (d) that the current Plaintiff be appointed the Representative Plaintiff of the Plaintiff Class; (e) that the claims of the Plaintiff Class are for damages arising from personal injuries as a result of consuming the tainted baked goods; (f) that the relief sought by the Plaintiff Class is judgment against the Defendant for negligence and breach of warranty and, if granted, for general damages, special damages, punitive damages, interest pursuant to the ***Court Order Interest Act***, R.S.B.C. 1996, c. 79, and costs of this action pursuant to s. 37(2) of the ***Act***; and (g) the following questions be certified as common issues in the class proceeding:

> (i) did the Defendant have a duty to ensure that its baked goods were safe and reasonably fit

for its intended purposes, being human consumption?

(ii) Was the Defendant negligent in the manufacture, distribution, or sale of the baked goods that were tainted with Salmonella Enteritidis bacteria?

(iii) Did the Defendant's negligence in the manufacture, distribution, or sale of its baked goods cause damage to members of the Plaintiff Class

(iv) Did the Defendant expressly or impliedly warrant that its baked goods were safe and reasonably fit for their intended purpose, being human consumption?

(v) Did the Defendant breach its warranty that its baked goods were safe and reasonably fit for their intended purpose, being human consumption?

(vi) Did the Defendants breach of its warranty that its baked goods were safe and reasonably fit for their intended purpose, being human consumption, cause damage to members of the Plaintiff Class?

(vii) Should punitive and exemplary damages be awarded against the Defendant and, if so, in what amount?

[2] This proceeding is unusual in that the Defendant admits that it negligently made and sold the tainted baked goods. Accordingly, the primary issue between the Defendant and members of the Plaintiff Class is whether it is appropriate to certify a class proceeding where questions of liability are admitted.

STATUTORY PROVISIONS

[3] The statutory criteria for deciding if an action should be certified as a class proceeding are set out under s. 4(1) of the ***Act***:

> 4(1) the Court must certify a proceeding as a class proceeding on an application ... if all of the following requirements are met:
> (a) the pleadings disclose a cause of action;
> (b) there is an identifiable class of 2 or more persons;
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
> (e) there is a representative plaintiff who
> (i) would fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[4] The Defendant takes no real issue with the question of whether a number of the requirements have been met. On a review of the materials before me, I am satisfied that the requirements set out under s. 4(1)(a), (b), and (e)(i) and (iii) of the ***Act*** have been met. Accordingly, the issue is

whether the requirements of s. 4(1)(c), (d), and (e)(ii) of the ***Act*** have been met.

DO THE CLAIMS OF THE CLASS MEMBERS RAISE COMMON ISSUES? (SECTION 4(1)(c) OF THE *ACT*)

[5] Section 1 of the ***Act*** defines "common issues" as: (a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts. After the Defendant admitted liability, the Statement of Claim was amended so that the Representative Plaintiff claimed punitive or exemplary damages for: "...the reckless and unlawful conduct of the defendant and its wanton disregard for the health and safety of its customers." I am satisfied that the claim for punitive or exemplary damages is a common issue and that it remains as a common issue. There has been no admission of liability for those damages. However, even if there had been no claim for punitive or exemplary damages or if the Defendant had admitted liability for such damages, I am satisfied that the requirement of s. 4(1)(c) has been met.

[6] In ***Endean v. Canadian Red Cross Society*** (1997), 36 B.C.L.R. (3d) 350 (B.C.S.C.), K. Smith J., as he then was, stated:

> A common issue is sufficient if it is an issue of fact or law common to all claims, and that its resolution in favour of the plaintiffs will advance the interests of the class, leaving individual cases to be litigated later in separate trials, if necessary: ***Harrington v. Dow Corning Corp.*** (1996), 22 B.C.L.R. (3d) 97 (B.C.S.C.) at 105, 110. (At p. 359).

[7] In ***Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*** (2000), 201 D.L.R. (4th) 385 (S.C.C.), McLachlin C.J.C., on behalf of the Court, stated:

> The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situationed *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit. (at p. 401)

[8] Even if fault had not been admitted, I am satisfied that a defendant's admission of fault does not prevent the Court from certifying fault as a common issue. A bare admission

will not bind the Defendant against all class members unless embodied in a Court Order within a certified class proceeding: ***Bywater v. Toronto Transit Commission*** (1998), 27 C.P.C. (4th) 172 (Ont. G.D.). In that decision, Winkler J. stated:

> Here, the defendant admits liability for the cause of a fire. This admission, it contends, eliminates the common issue of liability. Since this, it asserts, is the only common issue, the certification motion must fail.
>
> I cannot accede to this submission. This is not to in any way detract from the commendable and timely admission of fault by the defendant. However, an admission of liability in the air does not advance the litigation or bind the defendant in respect of the members of the proposed class. Without a certification order from this Court no public statement by the defendant, and no admission in its defence to the nominal plaintiff, binds the defendant in respect of the members of the proposed class. A class proceeding by its very nature requires a certification order for the proposed class members to become parties to the proceeding. If the proposed class members are not parties to the proceedings, the admission of liability, as it relates to them, is no more than a bare promise....In any event, absent a judgment by a court of competent jurisdiction on the basis of the admission, *res judicata* does not apply to the proposed class.... Therefore, the admission *simpliciter* does not resolve the common issue of liability as it relates to the class members nor does it bind the defendant to them. (at pp. 177-8)

[9] I am advised that there are 48 known potential members of the Plaintiff Class. Liability would have to be determined in 48 separate actions before damages could be assessed. It is necessary to the resolution of each of the claims of each of

the Members of the Plaintiff Class that liability be determined. It will avoid duplication of fact-finding or legal analysis if there need be only one court determination of liability.

[10] I am satisfied that the resolution of each of the other common issues listed by the Representative Plaintiff will substantially advance the actions of each of those members of the Plaintiff Class if separate actions were required because this action is not certified. The admission of liability and the binding of this Defendant in respect of the members of the proposed Plaintiff Class is sufficient to justify the Certification Order sought by the Representative Plaintiff. The next question which arises is whether the class proceeding is a preferable procedure for the fair and efficient resolution of the common issues.

IS THE CLASS PROCEEDING A PREFERABLE PROCEDURE? (SECTION 4(1)(d) OF THE *ACT*)

[11] In ***Hollick v. Toronto*** (2001), 205 D.L.R. (4th) 19 (S.C.C.) McLachlin C.J.C. set out the three advantages of class action proceedings:

> The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in ***Western Canadian Shopping Centres*** (at paras. 27-29),

> class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public....In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters. (at pp. 28-29)

[12] Judicial economy is not served by 48 separate actions. As well, counsel for the Representative Plaintiff is prepared to agree that the damages suffered by many of the members of the Plaintiff Class may be less than the $10,000 limit of the Small Claims Division of the British Columbia Provincial Court. If that is so, it is appropriate to distribute the cost of proving liability and quantifying any punitive damages amongst all of the Class Members rather than running the risk that any one or more of the members of the Plaintiff Class may find it too costly to prosecute the claim on his or her own.

[13] By Certifying this action, a multiplicity of proceedings and the possibility of inconsistent verdicts can be avoided, the efficient handling of complex issues rather than having

the issues re-litigated at numerous trials can be encouraged, the cases remaining after the common issues have been determined can be dealt with inexpensively and expeditiously pursuant to s. 27(3) of the ***Act,*** there is a possibility of a global settlement, and there is more likelihood of consistent settlements with members of the Plaintiff Class.

[14] I am satisfied that access to justice is fostered by permitting the advancement of claims that have previously been uneconomical to pursue because the damages for each individual plaintiff are too small for each claimant to recover through usual court procedures: ***Endean***, *supra*, at para. 63 and ***Harrington***, *supra*, at para. 49. A class proceeding is the only practical and efficient means of resolution of the claims which have modest damage potential and which would require considerable expenditure to prove liability and any punitive damages.

[15] Section 4(2) of the ***Act*** sets out factors which the court must consider in determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues:

> 4(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[16] I am satisfied that the common issues predominate over any questions affecting only individual members of the Plaintiff Class. As well, although personal damages must be assessed on an individual basis, certification should not be refused merely because the relief claimed includes a claim for damages. If necessary, the individual assessment can proceed after a determination of the common issues: Section 7(a) of the ***Act***. As well, the common issues of liability and liability for punitive damages predominate over a question of personal damages.

[17] In view of the modest amount of damages that will likely be available to members of the Plaintiff Class and of the cost of pursuing separate actions, I am satisfied that it is not likely that a significant number of the members of the Plaintiff Class have an interest in individually controlling the prosecution of separate actions. As well, s. 16(1) of the ***Act*** permits British Columbia residents to opt out of a certified class so that members of the Plaintiff Class are not precluded from prosecuting separate actions. The desire of some members of the Plaintiff Class to prosecute separate actions should not preclude: "...class proceedings by others for whom a class action is the only practical avenue for relief.": ***Harrington***, *supra*, at para. 49.

[18] As there is no evidence that this proceeding involves claims that are or have been the subject of other proceedings, I am satisfied that s. 4(2)(c) does not apply. In dealing with the question of whether other means of resolving the claims are less practical or less efficient, I have reached the conclusion that they are. One action is much more efficient than 48. This Class Proceeding is much more efficient and effective than what is proposed by the Defendant. The Defendant has already resolved one claim. An offer was made by the Defendant to resolve further claims “...

as quickly as possible without incurring any significant legal expenses." What was suggested was that the B.C. Centre for Disease Control ("C.D.C.") forward letters to each of the 48 individuals thought to be members of the Plaintiff Class asking them to outline their symptoms so that settlement negotiations could be initiated and settlement could be made in each of these cases without delay or litigation costs.

[19] In response, the Representative Plaintiff submits that the proposal of the Defendant is deficient in several respects: (a) it provides no method for resolving common issues; (b) there is no definitive process by which the quantum of the damages of the Members of the Plaintiff Class will be fairly assessed; (c) there is no method for adjudicating disputes that arise as to causation or quantum of damages; (d) the process is not binding on either the Defendant or the proposed class; (e) the parties are placed in an unequal bargaining position; (f) the claims of Members of the Plaintiff Class will be statute barred in August and September 2002 if the action is not certified; (g) the request does not bind the C.D.C. to contact the class members to inform them of their right to make claims so there is no definitive notification procedure; and (h) breakdowns in the

negotiation process will lead to a multiplicity of individual lawsuits.

[20] I agree with the submissions made on behalf of the Representative Plaintiff. First, all claims will be barred if this action is not certified or if separate actions are not commenced in the next four to five months. That right of action should not be lost and it must be noted that the Defendant has not offered to waive the limitation periods. Second, there would be no control over the notification of the 48 individuals who are thought to comprise the Plaintiff Class. By requesting that the C.D.C. forward letters, the Defendant has no control over whether that is done or whether there is appropriate follow-up which would allow the conclusion to be drawn that all steps have been taken to seek out the 48 individuals who could be members of the Plaintiff Class.

[21] Third, I am advised that the C.D.C. will not release the names of the 48 individuals without a Court Order. The Defendant would not be in a position to obtain a Court Order to obtain the list so it could supervise notification as there would be no action commenced which would allow the Defendant to apply for such an Order. Even if there was a proceeding where such an application could be made by the Defendant, the

Defendant is not motivated to seek out potential claimants. Only a Representative Plaintiff would be. Fourth, separate negotiations regarding quantum would not necessarily result in similar settlements for those suffering similar damages. Fifth, there is no method for adjudicating disputes that might arise other than the commencement of separate actions by the 48 individuals. The best gauge of the failure of the procedure advocated by the Defendant is the fact that, of the 48 potential members of the Plaintiff Class, only one settlement has been reached to date despite liability being admitted.

[22] Dealing with an alternate procedure outside of the judicial system, Brokenshire J. had these observations in ***Brimner et al v. Via Rail Canada Inc. et al*** (2000), 50 O.R. (3d) 114 (Ont. Sup. Ct.):

> It occurs to me there is a further problem. Via has a list of all of the passengers, but for, I believe, 14 of them, it has no address or telephone number. Via's proposal is to somehow locate these people. It has no answer as to what happens if it cannot. Most of the passengers for whom it has addresses seem to come from Ontario, Michigan or perhaps elsewhere in the United States. The class action process does provide an answer - a notification process is approved by the court and the court then has jurisdiction including jurisdiction to deal with persons who do not bring claims before the court. (at p. 119)

[23] As well, it is beyond the statutory functions provided to a Judge of this Court to supervise the process which is suggested by the Defendant. I am satisfied that the possibility of an unequal bargaining position and the potential for inequality and inequity of settlements is such that a class proceeding is preferable. What is proposed by the Defendant is less practical, less efficient and more difficult if not impossible to administer. I am also satisfied that the administration of the class proceedings would not create greater difficulties than those likely to be experienced if relief was sought by individual actions or the negotiation process suggested by the Defendant.

IS THERE A PLAN THAT SETS OUT A WORKABLE METHOD OF ADVANCING THE PROCEEDING AND OF NOTIFYING CLASS MEMBERS OF THE PROCEEDING?

[24] The plan for the proceeding and for notifying members of the Plaintiff Class involves the mailing of a notice to Class Members, the Representative Plaintiff bearing the cost of mailing the notice to Class Members, the Defendant bearing the cost of publishing advertisements in various newspapers, and further applications to deal with the trial of common issues and a methodology for resolving remaining issues. While I am not satisfied that the Representative Plaintiff has produced a plan for the proceeding that sets out a workable method of

advancing the proceeding on behalf of the Class and of notifying Class Members of the proceeding, I am nevertheless satisfied that it is appropriate to certify the proceeding as a Class Proceeding. While the court “must" certify a proceeding if all of the requirements set out in s. 4(1) have been met, I am not satisfied that it would be inappropriate to certify such a proceeding if one of the requirements has not been met. Rather, I am satisfied that it remains within the discretion of the Court to certify a proceeding even though the Representative Plaintiff has not yet produced a workable plan as is required under s. 4(1)(e)(ii) of the ***Act***.

CONCLUSION:

[25] There will be an order certifying this proceeding as a Class Proceeding. The orders and declarations sought by the Representative Plaintiff are granted. The questions set out above are certified as common issues in the Class Proceeding. The Representative Plaintiff is to apply before me no later than May 8, 2002 to approve: “...a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of a class and of notifying Class Members of the proceeding...”.

“G.D. Burnyeat, J.”
The Honourable Mr. Justice G.D. Burnyeat