

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jones v. Zimmer GMBH*,
2010 BCSC 897

Date: June 25, 2010
Docket: S095493
Registry: Vancouver

Between:

Dennis Jones and Susan Wilkinson

Plaintiffs

And

Zimmer GMBH, Zimmer, Inc., and Zimmer of Canada Limited

Defendants

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Before: The Honourable Mr. Justice Bowden

Ruling on Scheduling

Counsel for the Plaintiffs:

D.A. Klein
J.Z. Murray

Counsel for the Defendants:

A. Borrell

Place and Date of Hearing:

Vancouver, B.C.
June 1, 2010

Place and Date of Judgment:

Vancouver, B.C.
June 25, 2010

[1] The plaintiffs are seeking to have this action certified as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the “Act”).

[2] The matter came before me as the case management judge for a ruling on the appropriate schedule for the steps leading up to and including the certification hearing which is estimated to take three days.

[3] The plaintiffs propose a schedule that will lead to the certification hearing commencing on November 1, 2010. The defendants propose a schedule that will result in the certification hearing occurring in May of 2011.

[4] The parties acknowledge that the requirement in s. 2(3) of the *Act* that an application for certification must be made within 90 days of the delivery of the last appearance or statement of defence is rarely met.

[5] In support of their position the plaintiffs refer to *Baxter v. Canada (Attorney General)*, [2005] O.J. No. 2165, where, considering similar legislation, the Ontario Superior Court said that the certification motion should be heard promptly and normally given priority over other motions. The plaintiffs add that the certification hearing is not about the merits and therefore there is much less material that must be provided at this stage than later in the proceeding. The plaintiffs also point out that because the persons who may become part of the class represent an older demographic, an earlier certification hearing is preferable.

[6] The defendants say that the schedule proposed by the plaintiffs is unusually quick. The defendants are particularly concerned because the case will involve European parties and they will not be readily available during the summer months. The defendants also say that there is no pre-existing body of experts in the area of the dispute and they will be starting from square one.

[7] The defendants refer to case authorities that suggest that a six to nine month period is reasonable for pre-certification steps but acknowledge that each case is unique as to the time requirements.

[8] With regard to the defendants' concerns about expert evidence I note that such evidence is not subject to the exacting scrutiny at a certification hearing that it will at a trial. (*Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418)

[9] In weighing the opposing positions of the parties, in addition to the case law, I have considered the prejudice to the parties of the different schedules proposed. In essence, the defendants argue that they need more time to prepare for the hearing than would be allowed by the schedule proposed by the plaintiffs. The plaintiffs stress that because of the elderly demographic of the potential members of the class an early certification hearing is preferable.

[10] On balance, I am persuaded that the certification hearing should occur sooner rather than later but I am also of the view that the schedule suggested by the plaintiffs may place the defendants in an unfair position.

[11] Accordingly, it is my view that the following schedule should be adhered to:

- 1) As the plaintiffs have already delivered to the defendants their material in support of their application for certification, the defendants will have until October 1, 2010, to deliver to the defendants their material in response.
- 2) The plaintiffs will then have until November 6, 2010, to deliver to the defendants any affidavits in reply and their argument.
- 3) The defendants will then have until December 10, 2010, to deliver to the plaintiffs their argument.
- 4) The plaintiffs are to deliver their reply to the defendants' argument no later than January 7, 2011.
- 5) The certification hearing will commence on February 7, 2011.

"The Honourable Mr. Justice Bowden"