CITATION: Workman Optometry Professional Corporation et al. v. Certas Home and Auto Insurance Company et al., 2022 ONSC 597
COURT FILE NO.: CV-20-00643488-00CP
DATE: 20220128

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
WORKMAN OPTOMETRY PROFESSIONAL CORPORATION, 1298928 ONTARIO LTD., THE SUIT SHOP CO. LTD., 2328867 ONTARIO INC. (o/a BOOSTER JUICE 369, BOOSTER JUICE 388, BOOSTER JUICE 375, AND BOOSTER JUICE 452), 2635774 ONTARIO INC. (o/a BOOSTER JUICE 275), 2660364 ONTARIO INC. (o/a BOOSTER JUICE 200), IN HARMONY DANCE & WELLNESS LTD., RANA TAJI OPTOMETRY PROFESSIONAL CORPORATION, and SCOTIAN ISLE BAKED GOODS INC.	)	*See Schedule "A" attached to this Endorsement*
Plaintiffs	)	
– and –	)	
CERTAS HOME AND AUTO INSURANCE COMPANY, CO-OPERATORS GENERAL INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, ECONOMICAL MUTUAL INSURANCE COMPANY, FEDERATED INSURANCE COMPANY OF CANDA, GORE MUTUAL INSURANCE COMPANY, INTACT INSURANCE COMPANY, CERTAIN UNDERWRITERS AT LLYOD'S SUBSCRIBING TO POLICY NO. LNP2210, CERTAIN UNDERWRITERS AT LLYOD'S SUBSCRIBING TO POLICY NO.SR040046, CERTAIN UNDERWRITERS AT LLYOD'S	)	

SUBSCRIBING TO POLICY NO. GASS1300, NORTHBRIDGE GENERAL INSURANCE CORPORATION, NOVEX INSURANCE COMPANY, ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA, SGI CANADA INSURANCE SERVICES LTD., THE DOMINION OF CANADA GENERAL INSURANCE COMPANY, THE WAWANESA MUTUAL INSURANCE COMPANY, and WYNWARD INSURANCE GROUP Defendants	**HEARD:** November 30 and December 1, 2021

ENDORSEMENT

MCEWEN, J.

[1] This Motion concerns litigation arising out of the COVID-19 pandemic. As a result of the pandemic, both individual proceedings and class action proceedings (the "Coverage Proceedings"), have been brought by thousands of policy holders against numerous insurers seeking coverage for alleged business interruption losses.

[2] The plaintiffs and defendants in this action (the "Workman Class Action") negotiated an agreement which, amongst other things, certified the action as a class proceeding to determine three common questions (the "Common Questions") as follows:

a. Can the presence of the SARS CoV-2 virus or its variants cause physical loss or damage to property within the meaning of the business interruption provisions of each Defendant's property insurance wordings?

b. Can an order of a civil authority in respect of business activities that was made due to the SARS CoV-2 virus or its variants cause physical loss or damage to property within the meaning of the business interruption provisions of each Defendant's property insurance wordings?

c. If the answer to either of the first two questions is "yes", are there any exclusions in any of the Defendants' property insurance wordings that would result in coverage for such loss or damage being excluded?

[3] The defendants in the Workman Class Action (the "Moving Parties"), supported by the plaintiffs in the Workman Class Action seek an order, generally, directing a joint adjudication and common case management of the Common Questions with approximately 79 other proceedings advanced by approximately 2,000 plaintiffs (collectively the "Overlapping Proceedings"). The Moving Parties submit that the Overlapping Proceedings, which include the Workman Class Action, involve claims for business interruption losses arising out of the pandemic and engage one or more of the Common Questions. Ultimately, this would result in a joint trial on the Common Questions.

[4] It bears noting that the Overlapping Proceedings comprise the majority, but not all, of the Coverage Proceedings. Even if the Moving Parties are successful, there are approximately 17 additional actions (not included in the Overlapping Proceedings) that will proceed separately outside the proposed joint adjudication. In those actions the parties have either not confirmed a willingness to proceed as proposed by the Moving Parties (5 actions) or, according to the Moving Parties, the actions do not engage the Common Questions or only tangentially engage the Common Questions (12 actions). It also bears noting that the parties to the Workman Class Action have entered into agreements with counsel in other actions who have agreed to hold their matters in abeyance pending the outcome of any joint adjudication of the Overlapping Proceedings. There are approximately 7 such agreements in place

[5] With respect to the issue of joint adjudication of the Overlapping Proceedings, the Moving Parties' motion is opposed by a number of plaintiffs represented by McCarthy Tétrault LLP (the "McCarthy's Plaintiffs") who have commenced 72 actions against various insurers. The McCarthy's Plaintiffs consist of approximately 1,800 dentists and 100 physiotherapists. The motion is also opposed by another dentist, Dr. Jonah Marks Dentistry Professional Corporation ("Marks") and Kernels Popcorn Limited ("Kernels") who have brought claims against their insurers.

[6] For the reasons that follow, I am dismissing the Moving Parties' request for joint adjudication and common case management.

PROCEDURAL HISTORY

[7] Shortly after the Workman Class Action was commenced, Justice Belobaba was appointed as the Case Management Judge of the Workman Class Action. He was also appointed as Case Management Judge of the other related litigation including other class actions, many of the McCarthy's Plaintiffs, Marks and Kernels.

[8] On August 24, 2021, I accepted the request to transfer the Workman Class Action from the Class Action List to the Commercial List. I did so on the basis that the Workman Class Action has national scope (outside of Quebec). Additionally, amongst other things, the Workman Class Action involves enormous collective claims that will likely be measured in the billions of dollars, has wide-ranging ramifications for Canadian businesses and involves other substantial commercial dimensions which will result in wide-ranging ramifications for participants in the Canadian insurance industry.

[9] It is important to note, however, that it was only the Workman Class Action that was approved for transfer to the Commercial List with other actions remaining under the case management of Justice Belobaba.

[10] Subsequent to the transfer, the Moving Parties brought this motion which would allow for the joint adjudication of the Overlapping Proceedings with a judge of the Commercial List providing case management for all of the actions including those currently managed by Justice Belobaba.

ANALYSIS

[11] During the motion, the parties raised numerous arguments as to whether or not the relief sought by the Moving Parties ought to be granted.

[12] It is unnecessary to review each and every argument. In my view, the motion ought to be dismissed primarily for three discrete reasons which I will review below.

The Decision of Justice Belobaba dated May 27, 2021 Ought to be Afforded Deference

[13] Prior to the Workman Class Action being transferred to the Commercial List, Justice Belobaba heard a motion in April 2021 that is very relevant to the within motion brought by the Moving Parties. The motion before Justice Belobaba was brought only by four insurers in the Workman Class Action. It sought a stay of the McCarthy's Plaintiffs' Actions until the certification of the Workman Class Action had been decided.

[14] In his Reasons, dated May 27, 2021, Justice Belobaba dismissed the insurers' motion and declined their request to stay the McCarthy's Plaintiffs' Actions: see *Workman Optometry v. Aviva Insurance*, 2021 ONSC 3843.

[15] Justice Belobaba first found that he had jurisdiction to stay the McCarthy's Plaintiffs' Actions under s.13 of the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 (the "*CPA*"), ss. 106 and 107(1)(e)(i) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and r.6 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[16] In his subsequent analysis, Justice Belobaba accepted that there was substantial overlap of issues between the Workman Class Action and the McCarthy's Plaintiffs' Actions, that they evolved out of the same factual background, and that there would be some duplication of judicial and legal resources if the Workman Class Action and the McCarthy's Plaintiffs' Actions proceeded in tandem. Nonetheless, Justice Belobaba was of the view that there was "an abundance of…evidence" that there would be injustice or prejudice to the McCarthy's Plaintiffs if their actions were stayed.

[17] The injustice or prejudice to the McCarthy's Plaintiffs included, amongst other things, that the McCarthy's Plaintiffs were well informed litigants who believe they have substantial insurance claims, and that they wish for a speedy resolution in which they can control all aspects of their

lawsuit including settlement discussions. He also held that there was no prejudice to the insurers involved in the motion which, as noted, are defendants in the Workman Class Action.

[18] The McCarthy's Plaintiffs, supported by Marks and Kernels, submit that the motion before me is an abuse of process and the doctrine of *res judicata* applies. They argue the Moving Parties are attempting to relitigate a key outcome of the motion before Justice Belobaba – that being the issue of injustice and prejudice. They alternatively submit that the motion is an abuse of the Court's process, should not be tolerated, and further is a collateral attack on Justice Belobaba's decision.

[19] The Moving Parties disagree. They submit that their proposed joint adjudication process builds on Justice Belobaba's observations concerning the overlap between the Overlapping Proceedings. They further argue that none of the McCarthy's Plaintiffs' submissions are meritorious given the Moving Parties do not seek a stay before me, but rather an orderly joint adjudication of the Common Questions in all of the proceedings which the Moving Parties seek to include in the joint adjudication process.

[20] I agree with the Moving Parties that their motion does not constitute an abuse of process or a collateral attack on Justice Belobaba's decision. The parties to the motion before me are not identical to the ones before Justice Belobaba, the Workman Class Action has now been certified and the relief sought is different.

[21] It is my view, however, that I should afford deference to Justice Belobaba's decision as the Case Management Judge notwithstanding the evolution of the Workman Class Action. Justice Belobaba, as Case Management Judge, dealt with a very similar type of motion to the one now before me. He determined that real prejudice or injustice existed in refusing to grant the stay. Even though the motion before me does not deal with the stay but rather joint adjudication, the same principles are in play, i.e. the ability of well-informed individual litigants to pursue their individual actions for legitimate reasons, and under their control.

[22] This dovetails with existing jurisprudence which has held that the *CPA* is not intended to prevent, or impede, actions by individuals for no other reason than they are, or may be, members of a putative class in an action commenced by another party. This includes an individual not wanting to wait for the outcome of a class action proceeding: see *Dumoulin v. Ontario (Ontario Realty Corp.)*, [2004] O.J. No. 2778, at para. 8; *Vaeth v. North American Palladium Ltd.*, 2016 ONSC 5015, [2016] O.J. No. 4216, at para. 56.

[23] I was not aware of Justice Belobaba's decision at the time I approved the transfer of the Workman Class Action to the Commercial List. I am not casting aspersions in the direction of the Moving Parties, but the issue of how to deal with other proceedings was only generally raised with me when the matter was transferred to the Commercial List. In all of the circumstances this motion preferably should have been brought before Justice Belobaba given his earlier decision. As this was not the case, given the similarity between the two motions, I believe that Justice Belobaba's decision ought to be afforded deference.

[24] To do otherwise would essentially result in a different decision in similar circumstances. It would further remove Justice Belobaba from his role as the Case Management Judge and pass it to me. I am not prepared to do this given the history of this matter and his longstanding involvement with the various actions in which he has made a number of significant decisions. In approving the Workman Class Action for the Commercial List I was not made aware of the ramifications vis-à-vis Justice Belobaba's above noted decision and participation as Case Management Judge.

The McCarthy's Plaintiffs, Marks and Kernels Ought to be Allowed to Proceed Independently of the Workman Class Action

[25] In addition to affording Justice Belobaba's decision deference, I agree with his general proposition that the individual actions ought to be allowed to proceed. Justice Belobaba's reasons still resonate and I repeat and rely upon his findings, including the case law he relies upon, at paras. 8-22 of his decision.

[26] It further bears noting that in *Northfield Capital Corp. v. Aurelian Resources Inc.* (2007) 84 O.R. (3d) 748, (S.C.), at para. 37, Justice Ground, in refusing to consolidate individual actions with a class proceeding (as is the case here), held that "to order consolidation or trial together is tantamount to depriving the Plaintiffs of their right to opt out of the [class action]." A similar result occurred in the British Columbia Supreme Court case of *Watt v. Health Sciences Association of British Columbia*, 2018 BCSC 512, at para. 49, where the Court refused to consolidate an individual action with a class action and found that "the weight of authority is against such joinder."

[27] The Moving Parties do not have any Canadian case law to support their position. They largely rely on international jurisprudence that involves procedural schemes that are different from the *CPA*. Based on the foregoing, I agree with the McCarthy's Plaintiffs', Marks' and Kernels' submissions that the order sought by the Moving Parties would inappropriately undermine the Plaintiffs' right to opt out of the class proceedings under s.9 of the *CPA*.

Bifurcation and Delay

[28] I appreciate the Moving Parties' legitimate desire to streamline the Overlapping Proceedings and have them determined in a fair, efficient and effective manner particularly given that the issues involved in the Coverage Proceedings will very likely be subject to appeal. There are, however, a number of additional reasons why I do not believe that the proposal set out by the Moving Parties ought to be allowed.

[29] First, I agree with the McCarthy's Plaintiffs that the motion for joint adjudication would be tantamount to bifurcation of the issues in the McCarthy's Plaintiffs' Actions. The Moving Parties' proposed plan would first see the Common Questions tried. Thereafter, at the conclusion of those issues (and potentially the appeals that could result), the parties in the other actions, including the McCarthy's Plaintiffs, could pursue their own individual issues. This would amount to a denial of the McCarthy's Plaintiffs' and other plaintiffs' rights to have all of their matters dealt with at the same time.

[30] The case law is consistent that bifurcation remains the exception, not the rule and that consent is generally required: see *Duggan v. Durham Region Non-Profit Housing Corporation*, 2020 ONCA 788, 153 O.R. (3d) 465, at paras. 29, 31, and 38-39. None of the plaintiffs opposing this motion consent. Further, I agree that joint adjudication would delay the McCarthy's Plaintiffs, Marks and Kernels in having their matters finally adjudicated. All of these cases are further advanced than the Workman Class Action.

[31] Second, the McCarthy's Plaintiffs seek to advance their actions by way of three test cases, two of which are currently being managed by Justice Belobaba. The outcome of the test cases will likely determine the fate of the remaining McCarthy's Plaintiffs' Actions. The plan put forth by the McCarthy's Plaintiffs is a sensible one and allows them to pursue all of their claims not only in contract but also in bad faith, as well as their claims for damages. Further, the McCarthy's Plaintiffs, as well as Marks and Kernels, claim that their cases arise from the unique policy wordings and business structures not shared by most other plaintiffs. I do not propose to conduct a complex analysis of the various policies in play, but it is fair to say that the policy wordings are not identical and there may well be unique considerations for the trial judge to consider. Certainly, the McCarthy's Plaintiffs' claims involving dentists raises unique challenges including requirements imposed by health regulators.

[32] Third, it bears repeating that there are other cases that the Moving Parties do not seek to have subjected to their motion for joint adjudication. As noted, there are 5 such actions where neither the plaintiffs nor defendants have confirmed a willingness to move for joint adjudication.

[33] There are also 12 other actions where the matters are described by the Moving Parties as not engaging the Common Questions or only potentially engaging the Common Questions and there are 7 actions that are being formally or informally held in abeyance.

[34] One of the other actions in which the Moving Parties submit involves issues not engaged by the Common Questions is the case of *DentalCorp. Health Services ULC v. Zurich Insurance Company Ltd. et al.*, Court File No. CV-20-00643385-00CL. I have dealt with that case. It is scheduled to proceed to trial in June 2022. Of significance is the fact that the plaintiff in that action is a dental corporation that seeks significant damages against its insurer and insurance broker for damages arising out of a business interruption claim which forced the plaintiff, allegedly, to close substantially all of its 375 dental practices in March 2020. This is but one example of a similar action that will proceed to trial far in advance of either the Workman Class Action or the McCarthy's Plaintiffs, Marks and Kernels actions.

[35] Inevitably, there will be a number of different actions proceeding at different times. I do not agree that only those chosen by the Moving Parties ought to be forced into a joint adjudication.

[36] Based on the foregoing, therefore, I do not see a compelling reason as to why the McCarthy's, Marks or Kernels plaintiffs ought to be forced into joint adjudication.

ADDITIONAL COMMENTS

[37] Even if my analysis is incorrect and the Moving Parties were successful on this motion, it would result in the transfer of all of the Overlapping Proceedings to the Commercial List. The Commercial List would therefore assume management of all of the Overlapping Proceedings, not only with respect to the trial of the Common Questions, but also with respect to any potential resulting trials concerning some of the other Overlapping Proceedings with respect to issues of unique policy wordings, damages and other discrete issues. It would also have the Commercial List deal with all related motions and case conferences concerning the Overlapping Proceedings.

[38] Such a transfer necessarily engages the provisions of ss. 1(m) of the "Consolidated Practice Direction Concerning the Commercial List", (July 1, 2014) and I must conduct an analysis as to whether the Overlapping Proceedings should be listed on the Commercial List. In this regard, as per ss. 1(m), I am to take into account a number of factors including the current and expected case load of matters before the Commercial List. Given the sheer volume of cases that are currently on the Commercial List and expected during the pandemic, and the resulting demands upon the Commercial List, I would have exercised my discretion to decline the transfer of the remaining Overlapping Proceedings which, in and of themselves, will require a tremendous amount of judicial resources.

[39] Last, although it is not unusual for actions to proceed at different paces concerning significant issues of nationwide importance I do agree with the Moving Parties that the various actions, which deal with complex and significant litigation involving thousands of policy holders should proceed, as much as possible, in a coordinated manner insofar as hearing dates are concerned.

[40] The parties in the various actions can seek coordination between the Class Action List and the Commercial List in due course to determine whether some coordination is possible, particularly with respect to hearing dates. Alternatively, the Workman Class Action can seek permission to return it to the Class Action List.

DISPOSITION

[41] For the reasons above, the motion is dismissed.

[42] If the parties cannot agree upon the issue of costs, they may schedule a 30-minute case conference with me to determine further steps.

McEwen, J.

Released: January 28, 2022

Schedule "A"

***Workman Optometry et al. v. Certas Home and Auto Insurance et al*.**

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COURT FILE NO.: CV-20-00643488-00CP
DATE: 20220128

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

WORKMAN OPTOMETRY PROFESSIONAL CORPORATION, 1298928 ONTARIO LTD., THE SUIT SHOP CO. LTD., 2328867 ONTARIO INC. (o/a BOOSTER JUICE 369, BOOSTER JUICE 388, BOOSTER JUICE 375, AND BOOSTER JUICE 452), 2635774 ONTARIO INC. (o/a BOOSTER JUICE 275), 2660364 ONTARIO INC. (o/a BOOSTER JUICE 200), IN HARMONY DANCE & WELLNESS LTD., RANA TAJI OPTOMETRY PROFESSIONAL CORPORATION, and SCOTIAN ISLE BAKED GOODS INC.

Plaintiffs

– AND –

CERTAS HOME AND AUTO INSURANCE COMPANY, CO-OPERATORS GENERAL INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, ECONOMICAL MUTUAL INSURANCE COMPANY, FEDERATED INSURANCE COMPANY OF CANDA, GORE MUTUAL INSURANCE COMPANY, INTACT INSURANCE COMPANY, CERTAIN UNDERWRITERS AT LLYOD'S SUBSCRIBING TO POLICY NO. LNP2210, CERTAIN UNDERWRITERS AT LLYOD'S SUBSCRIBING TO POLICY NO.SR040046, CERTAIN UNDERWRITERS AT LLYOD'S SUBSCRIBING TO POLICY NO. GASS1300, NORTHBRIDGE GENERAL INSURANCE CORPORATION, NOVEX INSURANCE COMPANY, ROYAL & SUN

ALLIANCE INSURANCE COMPANY OF CANADA, SGI CANADA INSURANCE SERVICES LTD., THE DOMINION OF CANADA GENERAL INSURANCE COMPANY, THE WAWANESA MUTUAL INSURANCE COMPANY, and WYNWARD INSURANCE GROUP

Defendants

ENDORSEMENT

McEwen, J.

Released: January 27, 2022