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CITATION: Toronto Community Housing Corporation v. Thyssenkrupp Elevator (Canada) Limited, 2012 ONSC 225
DIVISIONAL COURT FILE NO.: 456/11
DATE: 20120110

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

BETWEEN:

TORONTO COMMUNITY HOUSING CORPORATION and HOUSING SERVICES INCORPORATED

Plaintiffs/Moving Party

Linda Rothstein, Odette Soriano and Danny Kastner, for the Plaintiffs/Responding Parties

- and -

THYSSENKRUPP ELEVATOR (CANADA) LIMITED, THYSSENKRUPP NORTHERN ELEVATOR CORPORATION, and THYSSENKRUPP ELEVATOR LIMITED all from time to time carrying on business under the name "Thyssenkrupp Northern Elevator" and "Thyssenkrupp Elevator"

Defendants/Responding Party

John P. Brown and Sarah W. Corman for the Defendants/Moving Parties

HEARD: December 7, 2011

DAMBROT J.:

[1] The defendants bring this motion for leave to appeal from the decision of Horkins J. granting the plaintiffs' motion for certification of this action pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "CPA") and granting the plaintiffs' motion to amend the statement of claim.

[2] The defendants seek leave to appeal primarily based on the proper application of the "some basis in fact" test for fulfilling the requirements found in s. 5(1)(c) and (d) of the CPA for certification of a class proceeding.

[3] The defendants also argue that the motions Judge erred in permitting the plaintiffs to amend their pleadings to add a statute-barred claim of negligent design.

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BACKGROUND

[4] The defendants design, manufacture, sell, install and/or service traction elevators. In 1987, a fatal accident occurred when the breaking mechanism on a traction elevator used in the construction of Toronto's Scotia Plaza failed, causing the elevator to accelerate upwards ("ACO") and slam into the top of the elevator shaft, killing two people. In 1989, two fatal accidents occurred in traction elevators in Ottawa as a result of uncontrolled car movement ("UCM"). As of April 1, 1990, all newly installed traction elevators in Ontario required ACO and UCM protection in accordance with a directive of the Technical Standards and Safety Authority ("TSSA"). Additionally, the TSSA required ACO and UCM protection be included when older traction elevators underwent modernization.

[5] The defendants developed the sheave jammer to meet these new requirements. A sheave jammer is a secondary braking device designed to stop movement of an elevator in the event that the primary control and braking systems do not operate effectively. There is no evidence of any problems with sheave jammers from 1989 to 1997. There is evidence that problems commenced in 1998. It is not necessary to recount these problems and the resulting TSSA orders in these reasons. It is sufficient to say that on July 27, 2006, the TSSA ordered that all sheave jammers were required to be replaced or retrofitted with another device that met certain safety requirements for ACO and UCM or be removed from service by August 1, 2007. On December 5, 2006, the retrofitting option was removed.

[6] As a result of this order, 2,032 traction elevators in Ontario required sheave jammer replacement. Despite the fact that 80 to 90% of owners of elevators with sheave jammers had maintenance contracts with the defendants, the defendants did not replace the sheave jammers pursuant to these contracts. They insisted upon being paid separately for the replacement. The defendants disposed of the sheave jammers and replaced them with rope grippers. The typical cost quoted for this work was \$11,950 per jammer.

[7] The plaintiff Toronto Community Housing Corporation is the largest social housing provider in Canada, and operates on a not-for-profit basis. It is a current owner of a traction elevator. The plaintiffs bring this action on behalf of a class of all current and previous owners of traction elevators in Ontario who were required to remove and replace sheave jammers following the issuance of the 2006 TSSA order.

THE CERTIFICATION ISSUE

[8] In *Hollick v. City of Toronto*, [2001] 3 S.C.R. 158, the Supreme Court of Canada explained, at paragraph 25, that in order to meet the certification requirements in the CPA:

... the representative of the asserted class must show some basis in fact to support the certification order. As the court in *Taub* held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the Report of the Attorney General's Advisory Committee on Class Action Reform clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see Report, at p. 31 ("evidence on the motion for

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certification should be confined to the [certification] criteria"). The Act, too, obviously contemplates the same thing: see s. 5(4) ("[t]he court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence"). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists: see *Branch, supra*, at para. 4.60.

[9] Accordingly, the requirement to show "some basis in fact" applies to the requirement in s. 5(1)(c) of the CPA that the claims of the class members raise common issues, and in s. 5(1)(d) that a class proceeding would be the preferable procedure for the resolution of the common issues.

[10] The defendants argue that there are many conflicting decisions in Ontario as to the meaning of the certification test. They conceded in their factum and in their oral argument that, "the application of the test adopted by the Motions Judge in [sic] consistent with a body of authority," but, they say, it is in direct conflict with another body of authority. This asserted conflict in the cases is at the heart of their application for leave, which, according to r. 62.02(4) of the *Rules of Civil Procedure*, is to be granted when 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.

[11] In making the argument that there is a growing body of decisions in conflict with the orthodox approach adopted by the motions Judge, the defendants focus on the decision of Perrell J. in *McCracken v. Canadian National Railway Company*, 2010 ONSC 4520. According to the defendants, this decision explains the earlier decision of the Court of Appeal in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal refused [2003] S.C.C.A. No. 106, and is supported, they say, by an article by M. Cullity, formerly an experienced and highly respected class action judge of this Court, entitled "Certification in Class Proceedings – the Curious Requirements of 'Some Basis in Fact'" (2011) 51 Can. Bus. L.J. 407.

[12] The defendants rely on these sources to fashion their argument that, while it is necessary for a plaintiff to adduce a minimum level of evidence to satisfy the certification requirements, this minimal level of evidence may not be sufficient to satisfy the criteria. The judge must go on to a second phase of analysis in which "[t]he defendant's evidence must also be taken into account and weighed appropriately." Thus in this case, according to the defendants, the motions Judge erred in concluding that the claims of the class members raise common issues on the basis of the evidence led by the plaintiffs, without going on to determine if this evidence was sufficient when considered in the context of the evidence led by the defendants "to the contrary."

[13] In my view, there is no decision by another judge or court in Ontario or elsewhere in conflict with the decision of the motions Judge on the meaning of the certification test. While the motions Judge must take into consideration any evidence lead by the defendants, neither *McCracken* nor *Chadha* suggest that a motions Judge who is satisfied that the plaintiff has

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adduced evidence that meets the requirements of s. 5(1)(c) and (d) of the CPA should then go on to a second phase and "appropriately" weigh the defendant's evidence on those issues.

[14] It is true, as the defendants emphasize, that Perrell J. said in *McCracken* that the "some basis in fact" test is a necessary, but not sufficient condition for establishing the various criteria for certification. He was undoubtedly correct. But what he meant, as he made perfectly clear in paragraph 301 of that judgment, was "that the some basis in fact test is a necessary but not sufficient condition for certification makes sense because the criteria for certification are not just factual matters." He went on to explain:

In so far as the criteria are factual, the plaintiff is more favourably treated than is the defendant. However, all the criteria are issues of mixed fact and law, and the legal and policy side of the class definition, commonality, preferability, and the adequacy of the representative plaintiff are matters of argument and not just facts, although there must be a factual basis for the arguments. While defendants may have to push the evidentiary burden up a steep hill, they are on a level playing field with the plaintiffs in arguing the law and policy of whether the various criteria have been satisfied.

[15] There is nothing in what Perrell J. said in *McCracken*, nor in what the Court of Appeal said in *Chadha*, nor for that matter in what Mr. Cullity said in his article, to suggest that on the basis of the existing law, the motions Judge is entitled to, far less required to, engage in the evidentiary exercise advocated by the defendants. To the contrary, as the Court of Appeal stated in *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 50, leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50, with respect to the common issues requirement in s. 5(1)(c):

Hollick also makes clear that this does not entail any assessment of the merits at the certification stage. Indeed, on a certification motion the court is ill-equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.

[16] This approach is entirely consistent with what the courts have repeatedly referred to as the low evidentiary burden that applies to s. 5(1)(b) to (e).

[17] Having reached the conclusion that there are no competing lines of authority in Ontario as to the meaning of the certification test, the defendants' application for leave to appeal in relation to the issue of certification is significantly undermined.

[18] In relation to s. 5(1)(c), the defendants argue first of all that the plaintiffs' led no evidence to show that the claims of class members raise common issues, while they, the defendants, lead significant evidence that there were no common issues.

[19] This argument begins with the defendants' assertion, accepted by the plaintiffs, that because the plaintiffs' claim in negligence is restricted to pure economic loss, the plaintiffs must prove that the sheave jammers were defective and dangerous. The defendants say that there is no

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evidence that the sheave jammers were defective and dangerous when they were installed, and that the plaintiffs did not lead any evidence to demonstrate if or why they became defective seventeen years later when the TSSA ordered their replacement.

[20] The defendants, on the other hand, filed extensive evidence that, they say, demonstrates that in order to determine if and why a sheave jammer was defective and dangerous, and if it had anything to do with the defendants' negligence, a host of individual issues would have to be considered. If this matter proceeds as a class action, individual examinations and assessments will be necessary in respect of each of the 2,000 sheave jammers they installed.

[21] This argument overlooks a considerable body of evidence led by the plaintiffs. I do not intend to summarize that evidence, except to note that the plaintiffs filed an affidavit of Roland Hadaller, a professional engineer employed as the Director of Elevating and Amusement Devices at the TSSA who was directly involved in the matters involving the sheave jammer that led to the TSSA orders. Mr. Hadaller swore that, after hundreds of tests observed by the TSSA on devices installed by and in most cases maintained by the defendants, the TSSA concluded that the sheave jammer was inherently unreliable. The unreliable nature of the sheave jammer was evident irrespective of the age of the sheave jammer, and irrespective of when maintenance was last performed on it. Most of the sites at which the TSSA observed the sheave jammer tests were elevating devices sites maintained by the defendants. He further swore when the defendants proposed a series of retrofit packages for the sheave jammer, the TSSA observed testing of the sheave jammers with each proposed retrofit installed by the defendants and concluded that none of the proposed retrofits resolved the unreliability of the sheave jammer to TSSA satisfaction. The TSSA concluded that the sheave jammer was inherently unreliable and the TSSA further concluded that the sheave jammer was not reliable enough to satisfy the requirements for protection against ACO and UCM as stipulated by the applicable code.

[22] The motions Judge took this and other evidence into consideration, and reached the view that the plaintiffs had led some evidence that sheave jammers were inherently unreliable, and more specifically, were not reliable enough to satisfy the requirements for protection against ACO and UCM. While no affiant used the words "defective and dangerous" to describe the sheave jammers, unquestionably this inference could be drawn from the evidence. There is no reason to doubt the correctness of the motions Judge's decision on this basis.

[23] However, the defendants go on to argue that there is no evidence that liability can be determined on a class-wide basis. The motions Judge addressed this issue head on. She stated, at paragraphs 156 to 158 of her reasons:

156 While the defendants assert that each common issue will require an individual inquiry, the evidence does not support this position. The defence evidence discusses the role that maintenance and life expectancy played in the operation of a sheave jammer and the order requiring the removal of all sheave jammers. However, specific examples of buildings and elevators with sheave jammers were not offered to support the defence position that an individual inquiry into every sheave jammer is required to consider if improper maintenance and/or the life expectancy of this product is responsible for the replacement. Such evidence, assuming it exists, would be within the knowledge of TKE since it held

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80-90% of the maintenance contracts for the elevators with sheave jammers. TKE mechanics therefore performed the periodic inspections and testing of the elevators. Log books recording maintenance were also kept on site. Not one elevator with a sheave jammer was offered in evidence as an example. No maintenance log books were produced.

157 As the defendants and TSSA worked to find a solution, each proposed solution was applied to the sheave jammers as a group. There is no evidence that the sheave jammers were dealt with on an individualized basis. For example, when increased maintenance measures and retrofit kits were proposed, they applied to all sheave jammers as a group. Similarly, the TSSA approached the sheave jammer problem as a group and treated all sheave jammers the same. Each TSSA order applied to all sheave jammers.

158 There is no evidence to explain why on the one hand TSSA and the defendants were able to deal with the sheave jammer as a product group and yet in this action an individual inquiry into each sheave jammer is required.

[24] After considering some additional evidence, she stated:

162 A certification motion is not meant to be a test of the merits of the action. It is not the time to weigh evidence and find facts. It is not the purpose of a certification motion to determine if the sheave jammers were dangerous and defective. The question under s. 5(1)(c) is whether there is some evidence to support the common issues and some evidence to show that they can be decided in common. A court is not required at this early stage in the action before a statement of defence is even filed, to engage in a review of speculative defences that may or may not be asserted.

163 The defendants may allege in their statement of defence that inadequate maintenance and/or end of life expectancy explain why the sheave jammers had to be replaced. However, on this certification motion, the defendants have only asserted that this will require an individualized inquiry. Of course it remains to be seen if the defendants will actually plead that inadequate maintenance is to blame for the final TSSA order, given that TKE maintained the majority of the elevators.

[25] Again, I see no basis to doubt the correctness of this aspect of the motions Judge's decision. This is particularly so because it is dependent on the defendants' assertion, which I have concluded is without foundation, that the motions Judge is obliged to consider the sufficiency of the plaintiffs' evidence on the issue in the context of the evidence led by the defendants "to the contrary."

[26] But the defendants then add a refinement to the argument. They say that the motions Judge failed to consider whether the plaintiffs provided "sufficient" evidence that there is a "method of proof" that can be used to establish the truth of the allegations on a class-wide basis, and that evidence of such a "method of proof" is an additional prerequisite to s. 5(1)(c). In this case, the defendants argue that this requirement obliged the plaintiffs to identify the defect

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alleged to exist in the sheave jammers, and lead some evidence that there was a "method of proof" that could be used to demonstrate that each sheave jammer was dangerous and defective on a class-wide basis. The plaintiffs lead no such evidence. The only case relied on by the defendants in support of this argument is *Chadha*.

[27] In that case, Chadha brought a class action against Bayer Inc., alleging price fixing of minor components of new houses, resulting in illegal price increases contrary to the *Competition Act*. The motions Judge defined the class as all persons who had purchased Bayer's product directly or indirectly and suffered losses resulting from Bayer's overcharging. The motions Judge concluded that a class action was the preferred procedure for resolution of the common issues, and that Bayer's liability could be established class-wide by calculating its net overcharges, following which each individual's damages could be assessed by individual hearings. Chadha's expert did not supply methodology to prove his assumptions that all purchasers had overpaid for houses containing Bayer's products.

[28] On appeal, the Divisional Court set aside the certification, finding that the loss could not be established on a class-wide basis due to the lack of methodology to trace Bayer's small overcharges through the manufacturing and distribution chain to the ultimate purchaser's home, and the failure to account for subjective factors such as the relative bargaining skills of vendors and purchasers, and the individualized nature of houses. The Divisional Court also found that the definition of the class was circular since it depended on establishing the merits of each individual claim.

[29] On a further appeal to the Court of Appeal, the Court concluded that the Divisional Court correctly decertified the action because the lack of methodology to establish a class-wide loss was a crucial obstacle to an effective class proceeding. This obstacle outweighed the potential benefits of a class action, and precluded it from being the preferable method of resolution of the common issues. Judicial economy would be undermined, not enhanced. The Divisional Court also correctly found that the class definition was flawed, as the members could not be objectively identified until the merits of each claimant's case was decided, thereby violating the policy embodied in the statutory scheme that merits are not decided at the certification stage.

[30] The defendant argues that this decision supports its argument that the plaintiffs are obliged to show a common method to prove liability on a class-wide basis in order to satisfy s. 5(1)(d). Without evidence of specific defects, the defendants say they have nothing to defend against.

[31] In my view, the decision in *Chadha* does not place in doubt the correctness of the decision of the motions Judge. *Chadha* was a case of price fixing asserted on behalf of a class of indirect purchasers of iron oxide pigments used to colour concrete bricks and paving stones which were incorporated into the construction of homes, buildings and landscaping. It was an effort to use the vehicle of a class action to compensate indirect purchasers of price-fixed goods.

[32] Harm, in the form of loss, is a component of this cause of action. To establish liability, the plaintiffs must demonstrate that the inflated price has been passed through to them. For this "pass-through" to be a common issue, the plaintiffs must adduce some evidence that the pass-through can be established on a common basis for all class members.

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[33] The difficulties for an indirect purchaser in a price-fixing case to establish harm to class members by any kind of common proof are well known. In *Chadha*, the Court of Appeal noted that the appellants would have to prove that any overcharge by the respondents to the direct purchasers of the iron oxide pigment was passed on through the chain of manufacture and distribution of the bricks to the ultimate purchaser of a home built using those bricks. The Court was also alert to the multitude of variables that can affect the price of a building, including: regional differences and delivery costs; the fact that iron oxide is used merely as a small component in another product or series of products; and that the alleged overcharge is only a trivial part of the purchase price of residential or commercial buildings, which are highly individualized end products.

[34] Faced with these difficulties, the *Chadha* plaintiffs could do no more than proffer expert evidence that purported to quantify the loss to consumers based on an assumption that the inflated price was passed through to consumers. The expert did not indicate a method for proving, or even testing that assumption.

[35] It was in that context that the Court of Appeal concluded that the lack of methodology to establish a class-wide loss was a crucial obstacle to an effective class proceeding. The Court of Appeal did not purport to create a rule that offering a precise methodology to prove liability on a class-wide basis (including in cases alleging negligence in respect of the design, manufacture, sale or installation of a defective product), was a prerequisite to satisfying the "preferable procedure" requirement in s. 5(1)(d) of the CPA. As a result, there is no basis for the defendants' argument that the plaintiffs here were obliged at this early stage to identify the specific defect alleged to exist in the sheave jammers.

[36] In my view, *Chadha* leaves the general rule in *Hollick* intact: "the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act," obviously including s. 5(1)(d). The motions Court must then consider the evidence through the lens of the three goals of class actions: access to justice, judicial economy and behaviour modification taking into account the importance of the common issues to the claims as a whole. In *Chadha*, the Court of Appeal concluded that a class action was not the preferable procedure. Here, the motions Judge concluded that it is. I see no reason to doubt the correctness of her decision, nor is any decision in conflict with hers on the matter involved in the proposed appeal.

[37] I would not grant leave to appeal in relation to the decision to certify this action.

THE AMENDMENT ISSUE

[38] The defendants seek leave to appeal from the order of the motions judge permitting amendments to the statement of claim in respect of a claim for negligent design. They say that the amendments permit the addition of a statute-barred claim to this proceeding.

[39] The motions Judge did not consider the claim of negligent design to be statute-barred. She was of the view that it had always been pleaded in the claim, and that the amendments were required only to correct drafting errors. She stated:

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96 Pleadings must be read generously and as a whole, allowing for inadequacies due to drafting frailties. In this case, the plaintiffs' original pleading contained sufficient material facts to support a cause of action in negligent design. It has been clear to the defendants since the claim was first issued that the plaintiffs were asserting a cause of action in negligence that encompassed the negligent design, manufacture, sale and/or installation of the sheave jammer. The defendants have had notice of the precise case that is to be met since the action was commenced in May 2008.

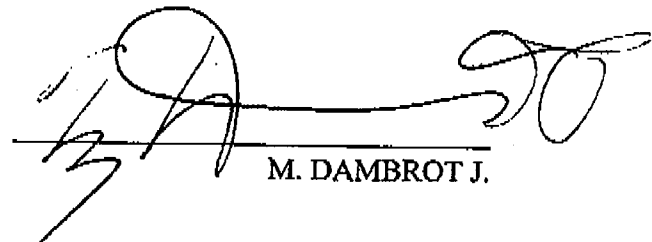
97 In these circumstances I conclude that it is not plain and obvious that the claim for negligent design cannot succeed because of a limitation period. In summary, First Ontario is added as a plaintiff and the statement of claim is amended in accordance with the "Amended Fresh Amended Statement of Claim" attached as Schedule "A" to the plaintiffs' motion record.

[40] The defendants argue that the plaintiffs did not plead the material facts required to support a claim of negligent design.

[41] I see no basis to doubt the correctness of the decision of the motions Judge, but in any event I do not consider it to be desirable to grant leave on this issue. The law with respect to the amendment of pleadings is well settled. This case raises no matter of public importance that transcends the interests of the parties. I would not grant leave to appeal on this issue.

DISPOSITION

[42] The motion for leave to appeal is refused. The parties may make submissions respecting costs in writing, if necessary. The plaintiffs may file and serve brief submissions within 21 days of the release of this decision. The defendants may serve and file brief submissions in response within 14 days of service of the plaintiffs' submissions.



M. DAMBROT J.

RELEASED: JAN 10 2012

CITATION: Toronto Community Housing Corporation v. Thyssenkrupp Elevator (Canada) Limited, 2012 ONSC 225

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Defendants/Moving Parties

REASONS FOR JUDGMENT

DAMBROT J.

RELEASED: January 10, 2012