

Case Name:

Lewis v. Cantertrot Investments Ltd.

PROCEEDING UNDER the Class Proceedings Act, 1992

Between

Solly Lewis and Hersl Kalif, plaintiffs, and
Cantertrot Investments Limited,
Sandor Hofstedter, Mark Samuel Mandelbaum,
George Hofstedter, Larry Froom, Alex Lewin,
Helen Gorender and Norman Hill Realty Inc., defendants

[2006] O.J. No. 1061
Court File No. 04-CV-277412 CP

Ontario Superior Court of Justice
M.C. Cullity J.

Heard: March 16, 2006.
Judgment: March 20, 2006.
(13 paras.)

Civil procedure — Parties — Class or representative actions — Certification — Common interests — Application by the plaintiffs for certification of a class action allowed — The defendant's opposition, based on a pending appeal which might preclude the plaintiffs' claim in waiver of tort, was not sufficient cause to delay the certification — The pleadings could be amended if the appeal decision later precluded the claim.

Application by the plaintiff for certification of a class action, based on an amended statement of claim — The amended statement of claim added additional defendants and causes of action, including claims in restitution and waiver of tort — The defendants opposed the certification pending the outcome of an appeal which they claimed could preclude certain of the plaintiffs' claims in restitution, including waiver of tort — The defendants claimed that the common issues claimed with respect to waiver of tort should not be approved — HELD: Application allowed — The fact that an appeal was pending which could impact on one claim in issue was not sufficient reason to delay the certification process — The law with respect to the onus on the plaintiffs in establishing waiver of tort was too uncertain for a decision to preclude the claim at the pleadings stage — Should the appeal decision preclude the claims for waiver of tort and other restitutionary claims of the plaintiffs, the defendants could move to further amend the plaintiffs' claims to reflect that outcome — In the meantime, the amendments would be approved and the action certified.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, s. 5(1)(a), s. 10

Counsel:

Samuel S. Marr and Vadim Kats for the Plaintiffs

ENDORSEMENT

¶ 1 **M.C. CULLITY J.**— For reasons delivered on August 24, 2005, [2005] O.J. No. 3535 and January 17, 2006, [2006] O.J. No. 199 I indicated that I would certify these proceedings under the CPA after pending questions relating to the amendment of the statement of claim and the inclusion of additional common issues had been resolved. The amendments were intended to respond to deficiencies that I had identified in the pleading of claims for breach of contract, as well as the addition of other defendants and claims for various restitutionary remedies - including waiver of tort - for which I had indicated that leave to amend would be granted.

¶ 2 An order approving an amended statement of claim containing all the amendments was subsequently signed by me and entered. Although the defendants had consented to the amendments - including the claims for waiver of tort and the other restitutionary remedies - their counsel had informed plaintiffs' counsel that they would not consent to the inclusion in the certification order of a common issue relating to waiver of tort until an appeal from my decision in *Serhan v. Johnson & Johnson* (2004), 72 O.R. (3d) 296 had been decided by the Divisional Court. Leave to appeal in that case had been granted by Ground J., [2004] O.J. No. 4580, on the basis that there was reason to believe that I had erred in finding that a cause of action had been disclosed by pleaded facts that I considered would support a remedy of waiver of tort.

¶ 3 Defendants' counsel had evidently decided that, as I had found that the cause of action for the restitutionary claims, including waiver of tort, had been sufficiently pleaded, they had no option but to consent to the filing of the amended statement of claim. At the same time they wished to reserve the right to oppose the addition of a common issue relating to it in the certification order if the reasoning of the Divisional Court appeared to be inconsistent with my finding that the cause of action had been sufficiently disclosed to satisfy the plain and obvious test applicable for the purposes of section 5(1)(a) of the CPA.

¶ 4 On this motion by the plaintiffs for approval of an additional common issue relating to waiver of tort, defendants' counsel requested that a decision be deferred pending the result of the appeal in *Serhan*. Counsel submitted that sufficient doubt had been cast by the reasons delivered by Ground J., and the submissions counsel had made at the initial hearing, to make this the most efficient manner of advancing the proceedings.

¶ 5 I believe the reservations expressed by defendants' counsel relate to the correctness of my finding that the restitutionary claims have been sufficiently pleaded - and not just the finding concerning waiver of tort. They extend not only to the question whether material facts that support a legal remedy of waiver of tort can be described as a cause of action - a question on which I had no doubt - but, in addition, and more generally, whether facts that would support a finding of any restitutionary remedies have been pleaded.

¶ 6 It was central to Mr Nadler's submissions that the availability of the remedy of waiver of tort and, I think, the other restitutionary remedies would require a finding of unjust enrichment and that this, in turn, would require the three-pronged test discussed in cases such as *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 and *Pettikus v. Becker*, [1980] 2 S.C.R. 834 to be satisfied. In particular, he submitted that it was plain and obvious that there would be a juristic reason for any enrichment of a defendant that arose from the facts pleaded.

¶ 7 On the present state of the authorities - and, in particular, to those that relate to waiver of tort and restitution in cases of breach of contract - I do not believe that this is necessarily correct. The Supreme Court of Canada held in *Soulos v. Kirkontzilas*, [1997] 2 S.C.R. 217 that the restitutionary remedy of constructive trust may be available in cases of wrongful conduct without unjust enrichment in the sense relied on by Mr Nadler. In my opinion, the law relating to waiver of tort and restitution for breach of contract is, at present, too undeveloped and uncertain to permit a decision - in the context solely of the pleadings - that the availability of either remedy will require the plaintiffs to establish that the three-pronged test of unjust enrichment is satisfied: *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.) *R.D. Belanger & Associates Ltd v. Stadium Corp of Ontario Ltd.* (1991), 5 O.R. (3d) 778 (C.A.).

¶ 8 The limited application of the three-part test for unjust enrichment - as subsequently accepted in *Soulos* - is referred to in Maddaugh and McCamus, *The Law of Restitution* (looseleaf edition), at para 3.2000.30, and the uncertainties surrounding waiver of tort and restitution for breach of contract are discussed at chapters 24 and 25 of the same work. A related ambiguity that is sometimes involved in references to "unjust enrichment" is referred to in *Waters' Law of Trusts in Canada* (3rd edition, 2005). at pages 466-7.

¶ 9 In this case, allegations have been made of tortious misrepresentations and a breach of a contract induced by behaviour described in the statement of claim as fraudulent, oppressive, vindictive and malicious. Mr. Nadler may, or may not, be correct in his submission that, notwithstanding the necessary assumption that these allegations would be proven at trial, it is plain and obvious that there was a juristic reason for any enrichment of a defendant - and that this is fatal to the pleading of the restitutionary remedies. The question was, however, argued by him at the previous hearing and I found then that the restitutionary causes of action would be sufficiently disclosed in the amended statement of claim. Leave to plead them was, in effect, granted when I signed the order which has been entered

¶ 10 In these circumstances, the normal method of challenging the correctness of my finding would, of course, be by way of an appeal, and that option will be open to the defendants irrespective of any order I may now make with respect to the restitutionary claims.

¶ 11 The CPA does, however, permit another approach to be adopted in the meantime for the purpose of moving the proceedings along. The restitutionary claims are no doubt important to the parties but several other claims are pleaded that may not be affected by the outcome of the appeal to the Divisional Court in *Serhan*. There is no reason to suppose that the deletion of the restitutionary claims would effectively terminate the proceedings, and I do not believe that it is in the interests of the efficient management of the proceedings to place them on hold pending the decision of the Divisional Court.

¶ 12 Accordingly, I intend to allow the proceedings to continue on the assumption that the findings I made with respect to the pleading of the restitutionary claims are correct and to approve additional common issues to be included in the certification order on this basis. Pursuant to section 10 of the CPA, such orders can be amended on a motion by a party at any time. In view of the dearth of jurisprudence relating to the remedies of waiver of tort, and restitution in cases of breach of contract, and the doubts expressed by Ground J., I will specifically give leave to the defendants to move to amend the certification order in the event that they consider the inclusion of any of the restitutionary claims is not consistent with the forthcoming decision, or reasons, of the Divisional Court in *Serhan*. In that event - and in addition to deleting common issues relating to waiver of tort. and, perhaps, all those arising under the restitutionary claims - the amendments to the order could delete any such inconsistent claims from those "asserted on behalf of the class" within the meaning of paragraph 8(1)(c) of the CPA.

¶ 13 As a consequence of the addition of claims for breach of contract and the restitutionary claims, the following common issues will be included in the certification order (after issue (f) in my Reasons of

August 24, 2005):

- (f.1) If the answer to question (a), (b), (c) or (d) is yes, did the defendants, or any of them thereby breach contractual obligations owed to the members of the class?
- (f.2) If so how are the defendants, or any of them, liable in damages and how are such damages to be computed?
- (f.3) If the answer to question (a) (b) (c) or (d) is yes, are the members of the class entitled thereby to a restitution of benefits obtained by the defendants, or any of them?
- (f.4) If the answer to question (f.3) is yes, what would be the measure of such restitution?

M.C. CULLITY J.

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