CITATION: 578115 Ontario Inc. (c.o.b. McKee's Carpet Zone) v. Sears Canada Inc., 2010 ONSC 5673
COURT FILE NO.: CV-09-378780-00CP
DATE: 20101015

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 578115 ONTARIO INC. O/A MCKEE'S CARPET ZONE, Plaintiff/Applicant

SEARS CANADA INC., SEARS ROEBUCK AND CO. and HOME COVERINGS BUYING GROUP INC., Defendants/Respondents

BEFORE: G.R. Strathy J.

COUNSEL: *David Thompson and Matthew G. Moloci*, for the Plaintiff/Applicant

W.A. Derry Millar, for the Defendants/Respondents Sears Canada Inc. and Sears Roebuck and Co.

Ronald G. Chapman, for the Defendant/Respondent Home Coverings Buying Group Inc.

DATE HEARD: September 20, 2010

ENDORSEMENT

(Alberta Sub-class and Costs of Certification)

[1] This endorsement addresses two issues arising out of the certification of this proceeding as a class action: see *578115Ontario Inc. v. Sears Canada Inc.*, 2010 ONSC 4571.

1. Creation of Alberta Sub-Class

[2] In my reasons at para. 40, I deferred the issue of an Alberta sub-class, and, if so, whether it is necessary to have an additional representative for that sub-class, to a post-certification case conference. I have now heard further submissions on the issue.

[3] The *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*C.P.A.*"), recognizes that the creation of a sub-class may be necessary to ensure the protection of a particular group of class members. This may require the appointment of a separate representative of that sub-class in an appropriate case. Section 5(2) provides:

> ... where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who [meets the requirements of s. 5(1)(e) with respect to the sub-class].

[4] In addition, the court has jurisdiction under s. 12 of the *C.P.A.* to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate ..."

[5] The common issues that have been certified, notably issues 9, 10 and 11, recognize that there are unique factual and legal issues that apply to the Alberta Class Members.

[6] There was evidence on the certification motion to the effect that, unlike the Class Members in other provinces, the Alberta Class Members received a franchise disclosure document. The example of that document, produced as an exhibit to the affidavit of Lesley Fuller on behalf of Sears, contains a clause entitled "Rebates or other Benefits to the Franchisor". It can be anticipated that Sears will argue that this document fulfills Sears' duties of disclosure and good faith to the Alberta Class Members.

[7] Thus, the claims of the Alberta Class Members clearly raise issues that are not shared by all class members and those claims will be subject to defences that are not applicable to all class members. There is at least the potential for conflict between the Alberta Class Members and other members of the class. Those other members might well claim that they should have received the same disclosure that was given to the Alberta Class Members and that such disclosure would have fulfilled the franchisor's duty. The Alberta Class Members would of course argue that the disclosure was inadequate.

[8] It seems to me, therefore, that fairness and the protection of the interests of the Alberta sub-class Members would require that there be a sub-class and a separate representative. I realize that this complicates life for class counsel, but the primary concern is the protection of the sub-class. I will leave it to counsel to consider the most appropriate manner in which to proceed in light of this decision.

2. Costs of Certification and Motion to Strike Pleadings

[9] I have also received written and oral submissions with respect to the costs of the certification motion and of Sears' successful motion to strike portions of the pleading containing references to the *Criminal Code*, R.S.C. 1985, c. C-46.

[10] The plaintiff asks for partial indemnity costs of certification, inclusive of fees, disbursements and taxes, in the amount of $113,580.45. The defendants say that the appropriate amount should be $79,911.45. Sears asks for the costs of its motion to strike in the amount of

$12,258.65, all inclusive. The plaintiff says that an appropriate award to Sears should be $10,000 and that the costs should be netted out at approximately $100,000, payable to the plaintiff.

[11] I will begin with some general observations.

[12] First, the plaintiff's claim for costs of this motion is well within the boundaries of the amounts that have been awarded for contested certification motions in recent years, with awards often in the several hundreds of thousands of dollars.

[13] Second, the motion was conducted in an efficient manner, with both parties deserving credit for narrowing the issues truly in dispute and making appropriate concessions. Again, it is not uncommon for such motions to be fought on every possible ground and to last for a week or more.

[14] Third, each side spent almost exactly the same amount of time in the preparation and hearing of the motion – slightly more than 300 hours in total, spread over several lawyers. Unlike some similar motions, the file was not "over-lawyered" by either side. Moreover, each party could reasonably anticipate the time spent by the other side, given its own commitment of resources.

[15] Turning to the plaintiff's claim for costs, almost all the time claimed is that of Mr. Thompson (92.1 hours - 1988 call) and Mr. Moloci (211.35 hours - 1998 call). This shows a reasonable division of responsibilities and an efficient use of resources. The standard full indemnity hourly rates of these lawyers ($475 and $375 per hour respectively) are well within the range I have observed in other cases and are appropriate, given their degree of expertise and specialization in class actions. By way of comparison, Mr. Millar's costs outline indicates an actual rate of $675 per hour and a partial indemnity rate claimed of $350 per hour. He would have claimed fees of about $75,000 on a partial indemnity basis, prior to taxes.

[16] The assessment of costs is not a scientific exercise and I am not dealing with the handicapping of racehorses. Mr. Thompson and Mr. Moloci were, however, facing formidable and seasoned opposition in the form of Mr. Millar and Mr. Chapman, on a very important and complex motion. In the circumstances of this case, it would not be unreasonable to consider a blended partial indemnity rate of $275 to $300 per hour. It is also appropriate to consider that the motion itself occupied some six hours and there were at least 30 additional hours spent post-certification dealing with a number of incidental matters arising out of certification. This would produce partial indemnity fees, before taxes, of between $90,000 - $100,000. The plaintiff's disbursements were $6,178.51.

[17] I accept the submission of Mr. Millar that the plaintiff's initial costs claim, starting from a solicitor-client basis and applying a percentage to that result, is not an appropriate methodology. I also accept the proposition that in considering rates claimed it is appropriate to consider the "Information for the Profession" published by the Costs Subcommittee of the Civil Rules Committee in 2005. Mr. Millar submits that following those guidelines, the appropriate rate for Mr. Thompson would be $310 per hour and for Mr. Moloci $240 per hour. I observe first

that the guidelines are now 5 years old and have not been reviewed, as was originally contemplated. I also observe that while the maximum rates were intended to apply to more complicated matters and more experienced lawyers within each category, we are dealing here with very experienced lawyers, in a specialized and demanding field. We are also dealing with two lawyers who generally work together – to abuse the earlier racehorse analogy – pulling the same wagon.

[18] I am not prepared to find that there was any inefficiency in the prosecution of the case by plaintiff's counsel. Nor am I inclined to parse the time spent or the time spent for travel. I accept the proposition that a photocopy charge of 25 cents per page may not be an excessive charge to the client but should be reduced on a partial indemnity claim for costs. This brings about a modest reduction in the disbursements.

[19] Having regard to the factors set out in Rule 57 and the reasonable expectations of Sears and HCBG, it seems to me that costs payable by the defendants to the plaintiff of $105,000 inclusive of fees, disbursements and taxes would be fair and reasonable in the circumstances of this case. I would allow Sears' claim for the costs of its motion at $10,000.

[20] Counsel should submit a draft order incorporating the foregoing, as well as the terms of the certification order that were discussed and resolved at the case conference on September 20, 2010.

G.R. Strathy J.

DATE: October 15, 2010