

CITATION: Barron v. Ford Motor Co., 2023 ONSC 6458
COURT FILE NO.: CV-23-00698148-00CP
DATE: 20231116

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JENNIFER BARRON, CATHERINE STEFAN, TARA JONES, TREVOR LEE,
and WERNER MEMERING, Plaintiffs

– and –

FORD MOTOR COMPANY, and FORD MOTOR COMPANY OF CANADA,
LIMITED, Defendants

BEFORE: E.M. Morgan J.

COUNSEL: *Hadi Davarinia and Take Soo Shin*, for the Plaintiffs
Jessica Lam, for the Defendants

HEARD: November 16, 2023

THIRD PARTY FUNDING

[1] Plaintiffs seek an order pursuant to section 33.1 of the *Class Proceedings Act, 1992*, SO 1992 c. 6 (“CPA”), approving the third-party litigation funding agreement (the “Agreement”) between the Plaintiffs, counsel to the Plaintiffs, and Woodsford Litigation Funding 27 LLP/Woodsford Group Limited (together “Woodsford”).

[2] This is a proposed consumer class action against Ford Motor Company and Ford Motor Company of Canada, Limited (collectively “Ford”), which designs, manufactures and sells Ford and Lincoln vehicles in Canada. The Plaintiffs claim that Ford sold them certain vehicles which contained an engine with a defect causing them to leak coolant. The Plaintiffs plead that this problem with the engine could result in the engine misfiring, stalling while driving, or potentially even catching fire.

[3] The Plaintiffs put forward claims for negligence, breach of warranty, and unjust enrichment on behalf of owners or lessees of the subject vehicles located in Canada, excluding the province of Québec. There is already a substantially similar action in Québec on behalf of the owners or lessees of the same model vehicles located in that province. The Québec plaintiffs’ counsel has signed a consortium agreement to act as co-counsel in this action.

[4] Cost awards against plaintiffs are common in Ontario class proceedings; recent judgments have reached six figures for some motions. The size of potential cost awards makes it too financially onerous for plaintiffs to bring an action such as the one at issue here without an indemnity for adverse costs.

[5] Furthermore, the experts required to prove that the Defendants' vehicles contained the alleged engine defect and that this alleged defect affected all of the various vehicles that are the subject of the claim will likely require large expenditures. This out-of-pocket expenditure also contributes to the non-viability of the claim without an independent funding body.

[6] For these reasons, the Plaintiffs and their counsel have entered into the Agreement with Woodsford, a U.K.-based, international litigation funder.

[7] Woodsford is a private company with considerable experience providing funding and indemnities to plaintiffs in group and class actions. The record shows that it is well-funded and financially able to satisfy its indemnity obligations under the Agreement in respect of any adverse costs awarded in this proceeding. It has given an appropriate undertaking to comply with any costs award and has waived any jurisdictional defenses it might have: *Wasylyk v Lyft Inc.*, 2023 ONSC 3597, at para. 10.

[8] Pursuant to the Agreement, Woodsford has agreed to pay up to a fixed sum for disbursements and provide an indemnity up to a fixed sum for costs awarded against the Plaintiffs. In return, Woodsford will receive a return of its invested capital plus 10% of the recovery achieved for the Plaintiff/class if the litigation is successful or is settled to the class' benefit. This level of recovery is on par with the 10% statutory levy that would be imposed by the Ontario Class Proceedings Fund had it provided the current funding. As such, it is at a level that has been approved in other class actions.

[9] I am satisfied that the terms of the Agreement reflect prevailing market rates for such funding agreements, and do not overcompensate Woodsford. If the litigation is not successful, Woodsford will not receive any return and will pay the committed adverse costs.

[10] Under the Agreement, Woodsford may only terminate the arrangement with Court approval, and only if certain conditions are met. The Agreement also provides that, absent certain extraordinary circumstances, Woodsford is not permitted to terminate the Agreement within 60 days of the certification hearing or the trial. It further sets out that and if Woodsford does terminate the Agreement with Court approval, it will remain liable for any adverse costs or disbursements incurred prior to that time.

[11] The first named Plaintiff, Jennifer Barron, has sworn an affidavit in support of this motion confirming her view that the Agreement is fair and reasonable. Ms. Barron has received independent legal advice in coming to this view. The other Plaintiffs have also indicated their approval of the Agreement.

[12] I understand that the disbursement and adverse costs amounts agreed to in the Agreement represent information that could disclose the Plaintiffs' litigation strategy and that, accordingly, the Plaintiffs have redacted those figures from the materials filed in this motion. However, Plaintiffs' counsel has shared these redacted sums with the Court, under seal, pursuant to section 33.1(6) of the *CPA*.

[13] The disbursements and adverse costs amounts are expected to be sufficient to cover the expenses they are designed to cover. The Agreement also obliges Plaintiffs' counsel to cover any

adverse costs and/or disbursements incurred that are above and beyond the limits of Woodsford's obligations.

[14] The Defendant has consented to an order maintaining the confidentiality of this information.

[15] The Agreement gives Woodsford no control over the action. It specifically provides that Woodsford accepts that Plaintiff's counsel's professional duties are owed to the Plaintiffs and not to Woodsford.

[16] The Agreement also imposes obligations on Woodsford to maintain the confidentiality of any information that the Plaintiffs or their counsel share with Woodsford. Related to this, it requires Woodsford to abide by the deemed undertaking rule in subrule 30.1.01(3) of the *Rules of Civil Procedure* as if Woodsford were a party to this proceeding.

[17] It is apparent to me that the Agreement is necessary to facilitate access to justice by the putative class members, and that it meets the terms required of it under section 33.1(9) of the *CPA*. I am satisfied that the action would not be able to proceed without it, and that obtaining funding on the terms set out in the Agreement is in the best interests of the class while being fair and non-prejudicial to the Defendant: *Gebien v. Apotex Inc.*, 2023 ONSC 46, at paras. 28, 32-33.

[18] There will be funding and confidentiality Orders to go as submitted by Plaintiff's counsel.

Date: November 16, 2023

Morgan J.