CITATION: Grossman v. Apple Canada Inc., 2024 ONSC 4127
COURT FILE NO.: CV-23-00701250-00CP
DATE: 20240723

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: BORIS GROSSMAN, Plaintiff

AND:

APPLE CANADA INC., Defendant

BEFORE: Justice Glustein

COUNSEL: *Vadim Kats, Matthew Baer, Chanèle Rioux-McCormick, and Nicole Taylor*, for the plaintiff

Moya Graham and Morgan Watkins, for the defendant

HEARD: July 16, 2024

REASONS FOR DECISION

NATURE OF THE MOTIONS AND OVERVIEW

[1] There are two motions before the court.

[2] The plaintiff, Boris Grossman ("Grossman") brings a motion under ss. 106 and 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("*CJA*") for a stay of the proposed class action (the "Grossman Action") brought against the defendant, Apple Canada Inc. ("Apple").

[3] Grossman seeks a stay pending final determination of the decision currently under appeal in *Lewis v. Uber Canada Inc. et al.*, 2023 ONSC 6190 ("*Lewis*"), which is scheduled to be heard by the Ontario Court of Appeal on September 17, 2024 (the "Lewis Appeal"). Apple opposes the stay motion.

[4] Apple brings a scheduling motion under s. 4.1 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*") to have its proposed motion for summary judgment (the "Apple SJ Motion") heard prior to the motion for certification. Grossman opposes the scheduling motion.

[5] For the reasons that follow, I dismiss the stay motion brought by Grossman and grant the scheduling motion brought by Apple.

FACTS

The Grossman Action

[6] The background facts of the Grossman Action are not contested.

[7] Apple operated a trade-in and recycling program (the "Trade In Program") through which consumers would receive a credit for a new Apple device upon trading in an old Apple device. The credit would be applied to the purchase of the new Apple device or would be provided as a gift card that could be used on purchase (if the trade-in was effected at a retail location) or at a later time.

[8] Grossman alleges that under s. 153(4) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), Apple was required to provide a sales tax credit on the trade-in value. It is not contested that Apple collected sales tax on the full value of the new Apple device and did not deduct sales tax on the credited amount.

[9] Grossman claims that Apple overcharged consumers who participated in the Trade In Program contrary to s. 153(4) of the *ETA*, thus (i) misleading consumers and breaching its duties under (a) the applicable provincial consumer protection statutes, (b) the *Competition Act*, R.S.C. 1985, c, C-34, and (c) contract, and (ii) committing the torts of negligence and conversion.

[10] Consequently, the principal issue before the court in the Grossman Action is whether Apple correctly charged sales tax under the Trade In Program.

The Lewis Action

[11] In *Lewis*, the plaintiff, who made purchases with promotional discounts, sought certification of a class action on behalf of users of the online food ordering and delivery platform Uber Eats. The plaintiff alleged that Uber (and not the customer) should have paid the sales tax on items customers purchased through the Uber Eats app using promotional discount codes.

[12] Consequently, in *Lewis*, there was no issue as to the proper calculation of sales tax. All parties agreed that the amounts had been calculated properly. Instead, the issue was whether, under s. 165 of the *ETA*, Uber or consumers ought to have paid the tax: *Lewis*, at paras. 11-13 and 21.

[13] In *Lewis*, the defendants opposed certification. One of the bases for the opposition was that the plaintiff had not satisfied s. 5(1)(a) of the *CPA* because there was no cause of action pleaded. The defendants submitted that under ss. 224.1 and 312 of the *ETA*, only the Crown could bring an action for recovery of tax under the *ETA*.

[14] Section 224.1 of the *ETA* provides:

> No person, other than Her Majesty in right of Canada, may bring an action or proceeding against any person for acting in compliance or intended compliance with this Part by collecting an amount as or on account of tax.

[15] Section 312 of the *ETA* provides:

> Except as specifically provided in this Part, … no person has a right to recover any money paid to Her Majesty as or on account of, or that has been taken into account by Her Majesty as, tax, net tax, penalty, interest or any other amount under this Part.

[16] In *Lewis*, the plaintiff submitted that the claim was not to recover taxes, but was instead a claim for consumer misrepresentation, breach of the *Competition Act*, breach of contract, and unjust enrichment based on the failure of Uber to pay the GST: at para. 21.

[17] The court considered the jurisdiction issue as a "threshold matter": at para. 17, and held that the court did not have jurisdiction to hear the claim. Justice Akbarali held that the claim was for "recovery of tax", and as such, was statute-barred: at paras. 41 and 57.

[18] The court also rejected the plaintiff's submission that the defendant could not avail itself of s. 224.1 because it did not act in "compliance or intended compliance" with its obligations under the *ETA* to collect sales tax. The court held that "the plaintiff has not pleaded any material facts to support its allegation that Uber's actions in charging and delivering the GST (assuming it was incorrectly calculated) to the merchant to remit were knowing or reckless": at para. 56.

[19] The court held, at para. 59, that "had I not concluded that the *ETA* operates to bar the plaintiff's claim, I would not have certified it for other reasons". The court found that the plaintiff had not established some basis in fact that (i) the class definition was workable (as required under s. 5(1)(b) of the *CPA*): at paras. 78-83, (ii) the proposed common issues could be decided in common (as required under s. 5(1)(c) of the *CPA*): at paras. 84-89, or (iii) a class action was the preferable procedure (as required under s. 5(1)(d) of the *CPA*): at paras. 90-92.

[20] The court also held that many of the causes of action could not be supported based on the facts alleged (contrary to the requirement under s. 5(1)(a) of the *CPA*): at paras. 64-77.

[21] The plaintiff appealed the decision in *Lewis* and the Lewis Appeal is scheduled to be heard on September 17, 2024.

The decision in *Gagnon*

[22] In *Gagnon c. Amazon.com inc.*, 2019 QCCA 1166, leave to S.C.C. refused, [2019] S.C.C.A. No. 364, the Quebec Court of Appeal held that the Superior Court of Quebec has jurisdiction to hear claims that are based on remedies available through the *Consumer Protection Act*, CQLR c. P-40.1, even if those claims required a judge to consider Part IX of the *ETA* (the same part at issue in the present case).

[23] The court in *Gagnon* held that the nature of the plaintiff's claims was based on misleading representations, and not a disguised attempt to recover tax. The defendants in *Gagnon* had also sought to rely on ss. 224.1 and 312 of the *ETA*: at paras. 52-53 and fn 41. The court rejected the defendants' submission and held, at para. 52:

> Le seul fait que la Cour supérieure puisse être éventuellement appelée à interpréter les dispositions de la *LTA* et de la *LTVQ*, dans le cadre de l'évaluation des dommages subis, ou lorsqu'elle examinera le devoir de mitigation des dommages des demandeurs, ne change pas la nature véritable de l'action collective qui repose sur des représentations trompeuses.

The Apple SJ Motion

[24] Apple has served a notice of motion seeking summary judgment to dismiss the action against it.

[25] One of the bases for the Apple SJ Motion is that the court has no jurisdiction to hear the action. Apple submits that the Grossman Action is a civil action against a defendant for the recovery of sales tax, and as such is statute-barred under ss. 224.1 and 312 of the *ETA*. That issue is one of the issues raised in *Lewis*.

[26] However, there are three other bases for the Apple SJ Motion, which do not require the determination of the statutory jurisdiction issue:

(i) Section 153(4) of the *ETA* does not apply to the Trade In Program since the conditions required to have sales tax paid on the net value of the transaction are not met. Apple submits that it did not receive the used Apple device as consideration for a new Apple device. Apple submits that on trade-in, ownership of the used Apple device was transferred to a third-party vendor who accepted the used device.

Consequently, Apple submits that if the court accepts that s. 153(4) of the *ETA* does not apply, it complied with the *ETA* by charging sales tax on the full price of the new Apple device before trade-in.

(ii) If Apple complied with the *ETA*, then the other causes of action in the proposed class action must fail because they depend on compliance with the *ETA*.

(iii) In any event, the plaintiff's action is barred by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B because the limitation period expired before the claim was commenced.

ANALYSIS

[27] I first address the stay motion brought by the plaintiff. I then consider the scheduling motion brought by Apple.

The Stay Motion

[28] As I discuss below, there is some uncertainty as to the appropriate test to apply when a plaintiff seeks to stay their own action. However, even if I apply the most lenient test proposed by the plaintiff, I would not exercise my discretion to grant a stay.

[29] Consequently, I first consider the applicable law and then apply the law to the present case.

The applicable law

[30] The plaintiff provided no authority in which a plaintiff sought an opposed stay of their own action. Instead, the plaintiff relied on cases where either (i) a plaintiff obtained a stay of their own action on the consent of the defendant (where the issue of the test did not arise), or (ii) a defendant sought a stay which was opposed by the plaintiff (where the issue is whether a plaintiff should be precluded from pursuing an action).

[31] Apple advised the court that it could not find any case in which the plaintiff sought a stay of their own action on an opposed basis, or where different parties in an unrelated action sought a stay which was opposed. Consequently, Apple relied on cases in which the defendant sought a stay which was opposed by the plaintiff (again where the issue is whether a plaintiff should be precluded from pursuing an action).

[32] The parties proposed different tests to be applied on the motion for a stay.

[33] The plaintiff proposed a test for stay based on the inherent jurisdiction of the court under s. 106 of the *CJA* to stay any proceeding on such terms as are considered just, as well as on s. 138 of the *CJA* which provides that "multiplicity of legal proceedings should be avoided."

[34] The plaintiff asked the court to stay his action based on the court's "inherent jurisdiction 'to control the process of the court, prevent abuses of process, and ensure the machinery of the court functions in an orderly and effective manner'": *Leong and Shah et al v. Ryabikhina*, 2013 ONSC 6725, at para. 5, citing *R.* v. *Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 18.

[35] Apple proposes a test based on the courts requiring that the discretion to stay a proceeding "should be exercised sparingly" and only in "the clearest of cases": *Aldo Group Inc. v. Moneris Solutions Corp.*, 2013 ONCA 725, 118 O.R. (3d) 81, at para. 30, citing *Navionics Inc. v. Nautical Data International Inc.*, [2006] O.J. No. 5397 at para. 29. Those cases arise when a defendant seeks a stay of a plaintiff's action.

[36] Both parties refer to the four factors discussed in *Hollinger International Inc. v. Hollinger Inc.*, 2004 CanLII 7352 (Ont. S.C.J.), at para 5, leave to appeal refused 2005 CanLII 4582 (Div. Ct.), at para. 5:

(i) There is a substantial overlap of issues in the two proceedings.

(ii) The two cases share the same factual background.

(iii) Issuing a temporary stay will prevent unnecessary and costly duplication of judicial and legal resources.

(iv) The temporary stay will not result in an injustice to the party resisting the stay.

[37] The plaintiff further submits that the general discretion under ss. 106 and 138 of the *CJA* can usurp the four *Hollinger* factors such that the court must exercise its discretion regardless of whether those factors are established.

[38] If the result of the stay motion depended on the applicable test, it would be necessary for the court to consider whether (i) the strict test against granting a stay to a defendant of a plaintiff's action should apply when the plaintiff seeks to stay their own action, (ii) the four factor *Hollinger* test should be applied to a plaintiff's motion to stay, or (iii) whether the court should discard the above tests and simply rely on the more lenient test to grant a plaintiff a stay of their own action based on the court's general discretion under ss. 106 and 138 of the *CJA*.

[39] There was no case law provided to the court on this issue, perhaps unsurprisingly as a plaintiff would rarely seek to stay their own action, let alone have such a request opposed by a defendant who wants to move the action forward.

[40] In the present case, however, there is no need for the court to decide the applicable test on a plaintiff's motion to stay their own action. As I discuss below, for the purposes of these reasons, I would not grant the stay even if I apply the most lenient test proposed by the plaintiff, based on the general discretion of the court under ss. 106 and 138 of the *CJA*, which allow the court to consider any factors relevant to stay any proceeding "on such terms as are considered just."

[41] Consequently, I do not decide which of the above tests apply to the case where a plaintiff seeks to stay their own action and such a stay is opposed by the defendant. Such circumstances would inevitably be rare, as it is almost always the defendant who seeks to stay an action and the plaintiff who opposes such relief. Instead, I consider the most lenient test and dismiss the motion for a stay on that basis.

Application of the law to the present case

[42] There are three bases on which I would not exercise my discretion to stay the Grossman Action pending final determination of the Lewis Appeal:

(i) The Lewis Appeal may not determine the statutory jurisdiction issue raised by ss. 224.1 and 312 of the *ETA*.

(ii) Even if the Lewis Appeal would necessarily decide the statutory jurisdiction issue, a stay of one action is not appropriate solely because another case on unrelated facts between unrelated parties raises the same legal issue.

(iii) Even if a stay could be granted because the same legal issue was being decided in an appeal in another unrelated action, a stay would not be appropriate in the present case as Apple raises several other grounds for summary judgment which could dispose of the Grossman Action regardless of the determination of the statutory jurisdiction issue.

[43] I address each of these factors below.

(i) The Lewis Appeal may not determine the statutory jurisdiction issue raised by ss. 224.1 and 312 of the *ETA*.

[44] The only proposed issue in the Apple SJ Motion which may be resolved by the Court of Appeal in the Lewis Appeal is whether ss. 224.1 and 312 of the *ETA* operate to bar a claim by a consumer against a private corporation.

[45] However, there is no certainty that the Court of Appeal will resolve the statutory jurisdiction issue in the Lewis Appeal.

[46] First, as I discuss at paras. 19 and 20 above, the court in *Lewis* held that even if the analysis of ss. 224.1 and 312 of the *ETA* did not bar the proposed class action, certification would still not be ordered since the plaintiff failed to meet the tests under ss. 5(1)(a) to (d) of the *CJA* to establish a cause of action, an identifiable plaintiff, commonality of issues, and preferable procedure. Consequently, the Court of Appeal in the Lewis Appeal could decide that it is not necessary to address the statutory jurisdiction issue.

[47] Second, as I discuss at para. 18 above, the court in *Lewis* held that there was no pleading of material facts to support the allegation that the defendant was "knowing or reckless", to avoid the jurisdictional bar under s. 224.1 of the *ETA*. Consequently, the Court of Appeal could find that jurisdiction may exist under a proper pleading, which would permit Grossman to bring a claim to address that concern.

[48] Notably, Grossman filed no evidence as to whether he would discontinue his action if the Lewis Appeal were unsuccessful. Instead, in his factum, the plaintiff only undertook to discontinue his action "if the *Lewis* Appeal renders the action herein moot." As I discuss above, there are several situations in which an unsuccessful appeal would not necessarily render the Grossman Action moot.

[49] Further, at the hearing, plaintiff's counsel (i) acknowledged that at best, an appeal "may" render the statutory jurisdiction issue moot and (ii) agreed that there was no certainty of such a result.

[50] Consequently, there is no basis to prevent Apple from moving forward with its summary judgment motion, given the risk that a decision on the Lewis Appeal will not resolve the statutory jurisdiction issue.

[51] Apple faces a claim seeking "pecuniary and special damages in the amount of $100,000,000 or as aggregated following a trial of the common issues," and "exemplary, punitive, and aggravated damages in the amount of $20,000,000."

[52] Apple should not be required to wait months or years until "final determination" of the Lewis Appeal, *i.e.*, a "temporary" but "undefined" stay sought by the plaintiff. While the appeal is scheduled to be heard on September 17, 2024, there is no certainty that the hearing date will not be adjourned. Even if the Lewis Appeal proceeds as scheduled, additional months may be required for a decision.

[53] Further, given the *Gagnon* decision (which may create conflicting law depending on the decision of the Court of Appeal), and the potential importance of the issue of the jurisdiction to seek civil remedies against private corporations for alleged consumer misrepresentations for breaches of the *ETA*, leave to the Supreme Court of Canada could be sought and if obtained could result in delays which extend for another year or more.

[54] In these circumstances, I would not exercise my discretion to grant the stay when it is not even certain that an appellate decision would address the statutory jurisdiction issue.

(ii) Even if the Lewis Appeal would necessarily decide the statutory jurisdiction issue, a stay of one action is not appropriate solely because another case on unrelated facts between unrelated parties raises the same legal issue.

[55] There is no basis for Apple to wait for years while a similar legal issue is being considered. It is commonplace for actions to move forward when a similar legal issue is being decided in an unrelated case with unrelated parties.

[56] A defendant may choose to consent to a stay of a class action pending determination of a similar legal issue in another action: *e.g.*, see *The Chief and Council of the Mississaugas of the Credit First Nation v. Attorney General of Canada*, 2021 ONSC 3253, at para. 3. However, a defendant is not required to wait while facing a class action solely because another class action (or any other civil action) raises a similar or identical legal issue.

[57] The plaintiff provided no case law where the plaintiff stayed either a class action or any civil action on an opposed motion when the defendant sought to move the action forward. While the lack of such case law does not mean that such a motion could not succeed, I would not exercise my discretion to order a stay in the present case since there is no connection between the facts or the parties in the two actions, and the only issue is a potentially common legal argument.

[58] The Court of Appeal frequently decides cases which raise legal issues which have a determinative effect on other concurrent litigation. Decisions by the Court of Appeal on legal issues have a binding effect on lower courts, which often could result in a position initially taken by a party in an unrelated action becoming "moot" based on the law arising from an appellate decision.

[59] However, the fact that an appellate decision may affect an existing action cannot serve as the basis of a stay for unrelated parties in an action with unrelated facts.

[60] The effect of the plaintiff's submission is that any plaintiff (class action or otherwise) can seek a stay whenever a legal issue critical to its case is raised in another action which is being considered by an appellate court. For the reasons I discuss above, I do not accept that submission.

[61] By way of example, the court in the proposed class actions addressing claims for intrusion upon seclusion arising from hackers who accessed defendant's databases did not stay other class actions when the validity of such claims was still to be determined by the Court of Appeal.

[62] In *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110 ("*Equifax*"), the court held that a class action based on a claim for damages arising from intrusion upon seclusion by hackers into a defendant's database disclosed a cause of action under s. 5(1)(a) of the *CPA*. That decision was reversed by the Divisional Court at 2021 ONSC 4112, with an appeal from the Divisional Court dismissed at 2022 ONCA 813. Leave to appeal to the Supreme Court of Canada was dismissed at [2023] S.C.C.A. 33.

[63] However, other cases which raised similar issues were not stayed until there was a "final determination" of the same issue. To the contrary, the court heard and decided *Obodo v. Trans Union of Canada, Inc.*, 2021 ONSC 7297, which raised the same issue as in *Equifax* of whether a claim for intrusion upon seclusion could be brought against a defendant whose database was hacked. The court in *Obodo* relied on the Divisional Court decision in *Equifax* (as the appeal before the Court of Appeal was pending) and found that no cause of action was disclosed on the claim for intrusion upon seclusion.

[64] Consequently, even if it could be said that the Lewis Appeal would necessarily decide the same statutory jurisdiction issue to be decided in the Grossman Action, a stay would not be appropriate.

[65] Again, Apple should not be compelled to face litigation for a claim of $120 million in damages for an undefined (albeit temporary) period of many months or years, just because another unrelated action raises the same issue (assuming the court accepts that the Lewis Appeal would raise the same issue, which I address under the first factor I consider at paras. 44-54 above).

[66] Consequently, I would not grant the stay even if the Lewis Appeal decided the statutory jurisdiction issue.

(iii) Even if a stay could be granted because the same legal issue was being decided in an appeal in another unrelated action, a stay would not be appropriate in the present case as Apple raises several other grounds for summary judgment which could dispose of the Grossman Action regardless of the determination of the statutory jurisdiction issue.

[67] The Apple SJ Motion raises important issues which were not before the court in *Lewis*. Even if the statutory jurisdiction issue is decided in the Lewis Appeal in a manner that resolves the issue in favour of the plaintiff in the present action, Apple has other bases to seek the dismissal of the action. Consequently in the Grossman Action, it may not even be necessary to consider the statutory jurisdiction issue, regardless of any decision in the Lewis Appeal.

[68] As I discuss at para. 26 above, Apple submits that section 153(4) of the *ETA* does not apply to the Trade In Program because Apple did not receive the used Apple device as consideration for a new Apple device but instead ownership of the used Apple device was transferred on trade-in from the customer to a third-party vendor that accepted the used Apple device. Consequently, Apple submits that regardless of statutory jurisdiction, it complied with the *ETA* by charging sales tax on the full price of the new Apple device before trade-in.

[69] Apple further submits that if it complied with the *ETA*, then the other causes of action in the proposed class action must fail because they depend on compliance with the *ETA*.

[70] Finally, Apple submits that regardless of the above additional submissions, the action is statute-barred under the *Limitations Act, 2002* because the limitation period expired before the claim was commenced.

[71] There is no basis for the Grossman Action to be stayed when any of the Apple submissions may dispose of the action in its entirety. Just because one argument on a summary judgment motion may be the same as an issue to be determined by an appellate court in an unrelated matter is not sufficient for the court to exercise its discretion to prevent a defendant from seeking the dismissal of significant litigation against it.

[72] The plaintiff submits that he may be required to incur costs to respond to the Apple SJ Motion when it is possible that the Lewis Appeal may render his claim moot based solely on the statutory jurisdiction issue. However, while plaintiff's counsel may want to save potential costs based on a speculative result of an appellate court, this does not support granting a stay which would saddle a defendant with potentially lengthy delay when the defendant raises grounds that could dismiss the action in its entirety.

[73] The plaintiff will be required to prepare a response to all of the other arguments raised in the Apple SJ Motion, regardless of any decision reached in the *Lewis* appeal. Any additional costs incurred to address the jurisdiction issues in *Lewis* are the same costs any plaintiff incurs when bringing an action which depends, in part, on an issue which is before the appellate courts.

[74] While the plaintiff may hypothetically decide to discontinue his action depending on the decision in the Lewis Appeal, that possibility should not delay a summary judgment motion which does not even depend on such a result.

[75] In such a situation, there is no duplication of resources or multiplicity of proceedings. There is only litigation based on the existing law, which may depend (for a single issue in the present case) on an issue before an appellate court. Consequently, while a plaintiff may save potential costs if they wait for final determination of one of many issues which arise in an action, a defendant is not required to wait until appellate review is complete of every possible claim that could cause an action to fail.

[76] At its core, the *Lewis* action involves the issue of who should pay the sales tax on the promotional discounts. There is no dispute that the sales tax was properly collected. In *Lewis*, the class action is based on the plaintiff's submission that it was Uber's obligation to pay the sales tax and not the consumers' obligation.

[77] In the present case, there is a core issue of whether Apple complied with the *ETA*, which will require a determination as to whether s. 153(4) of the *ETA* applies. If it does not apply, there may be no basis for a claim of non-compliance with the *ETA*, since if Apple's interpretation of s. 153(4) is correct, it charged the correct tax on the non-discounted amount. That issue, which is pivotal to the case, is not related to *Lewis*.

[78] Apple should not be required to wait until a single jurisdictional issue is determined (if in fact the Court of Appeal addresses that issue) before seeking to dismiss the claim against it.

[79] For the above reasons, I dismiss the stay motion.

The Scheduling Motion

[80] Apple submits that its summary judgment motion should be scheduled (and heard and disposed of) before the certification motion. The plaintiff submits that the Apple SJ Motion should be heard after the certification motion.

[81] I first review the applicable law and then apply the law to the present case.

<u>The applicable law</u>

[82] I first consider the strong presumption for scheduling a motion which addresses the merits of a claim (such as a summary judgment motion) before a certification motion. I then consider the plaintiff's position that the merits of the defendant's proposed motion must be considered by the court before deciding whether to schedule the motion before a certification motion.

(i) The strong scheduling presumption under s. 4.1 of the *CPA*

[83] Section 4.1 of the *CPA* was added as part of the legislative amendments to the *CPA*. Under the heading "Early resolution of issues", the section provides:

> If, before the hearing of the motion for certification, a motion is made under the rules of court that may dispose of the proceeding in whole or in part, or narrow the

> issues to be determined or the evidence to be adduced in the proceeding, that motion shall be heard and disposed of before the motion for certification, unless the court orders that the two motions be heard together.

[84] The role of the court under s. 4.1 on a pre-certification motion is clear. The court "shall" schedule (as well as hear and dispose of) the pre-certification motion before a certification motion if the pre-certification motion may dispose of the proceeding in whole or in part or narrow the issues to be determined or the evidence to be adduced in the proceeding. The only remaining discretion for such a motion is to order that the two motions be heard together.

[85] In *Dufault v. Toronto Dominion Bank*, 2021 ONSC 6223, Justice Belobaba scheduled the defendant's summary judgment motion prior to certification. He held that the motion, if successful, would narrow or dispose of all or part of the litigation.

[86] Justice Belobaba reviewed in detail the "strong legislative signal" under s. 4.1 that "early motions by the defendant that can indeed narrow or dispose of a case before certification should presumptively be heard before certification": at para. 9. The court held, at para. 6:

> The legislative intention as set out in s. 4.1 is clear: if a pre-certification motion can arguably dispose of the proceeding in whole or in part, or can narrow the issues or the evidence, the motion *must* be heard before certification, *unless* the court orders that the two motions be heard together. [Italics in original]

[87] In *Dufault*, at para. 5, Justice Belobaba also relied on the following statement by the Attorney General about the importance of early determination of the merits of proposed class actions:

> As I mentioned before, it often does take years for class actions to work their way through the court system … Not only does this use valuable court resources, but there are also significant financial and reputational risks for Ontario businesses. It is expensive and time-consuming for businesses to defend class actions that are dormant, that don't have merit, or can't be resolved in a reasonable amount of time. The cost of these lengthy lawsuits impacts shareholders, employees and consumers, and ultimately our economy. […]
>
> [W]e are introducing measures that put an emphasis on early motions by the defendant to narrow or dispose of a case before the certification stage. […]
>
> Mr. Speaker, to put it plainly, the current system … needs to change. …

[88] Similarly, in *Davis v. Desjardins Financial Services Firm Inc.*, 2022 ONSC 2016, Justice Shaw scheduled the defendant's summary judgment before the certification motion. The court followed the approach of Belobaba J. in *Dufault*, and held, at para. 29:

> I agree with Belobaba J.'s interpretation of s. 4.1 that the court's discretion is now much more restricted in determining whether a pre-certification motion ought to

> be heard. Section 4.1 clearly reflects new legislative priorities to ensure that class actions move expeditiously through the system and to dismiss those that lack merit before the parties expend scarce and unnecessary resources at certification.

[89] In *Dufault*, Justice Belobaba provided two examples where a court could order that the summary judgment motion be scheduled with (although not after) the certification motion. He held, at para. 10 [footnotes omitted]:

> For my part, there are at least two "good reasons" for denying a defendant's request for a pre-certification summary judgment motion under s. 4.1:
>
> (i) the defendant's motion does not raise any genuinely arguable issues that can narrow or dispose of all or part of the litigation and appears to be a delay tactic; or
>
> (ii) the defendant's motion does raise genuinely arguable issues that can narrow or dispose of all or part of the litigation but the existing or proposed dates for the certification motion and the summary judgment motion are sufficiently close that it makes sense to hear the two motions together.

[90] I follow the principles set out above. There is a strong presumption in favour of scheduling summary judgment (and other merits-based) motions prior to the certification motion and a court would need a "good reason" to alter that presumption, such as in the examples set out by Justice Belobaba in *Dufault*.

(ii) The role of the merits on a scheduling motion

[91] The plaintiff submits that the court must consider the merits of a proposed summary judgment (or other merits-based) motion to decide whether to schedule that motion before a certification motion. I do not agree.

[92] The court should (as suggested by Justice Belobaba in *Dufault*) review the proposed grounds of the summary judgment motion to ensure that (i) it meets the requirements of s. 4.1 that it may dispose of the proceeding in whole or in part or narrow the issues to be determined or the evidence to be adduced in the proceeding, and (ii) it is not a delay tactic. However, it is not appropriate for the court to assess whether the grounds of the proposed summary judgment motion have merit.

[93] The plaintiff relies on the statement by the Attorney General cited at para. 87 above in which he raised the concern that class actions "that don't have merit" should be resolved promptly because of the use of "valuable court resources", the "significant financial and reputational risks for Ontario businesses", and because "[i]t is expensive and time-consuming for businesses to defend class actions."

[94] However, the comments of the Attorney General do not suggest that the court, on a scheduling motion, review the merits of a proposed summary judgment motion (other than to address the court's potential concerns of a delay tactic, as discussed by Justice Belobaba in *Dufault*). Rather, the comments of the Attorney General set out the concern that if a class action may not have merit because of issues which can be addressed on a summary judgment (or other merits-based) motion, that motion should be scheduled before the certification motion.

[95] The plaintiff also relies on the following passage from Belobaba J. in *Dufault*, at paras 17-18:

> The defendant bank submits, in essence, that the plaintiff's claims (and those of the proposed class) have no merit — and if the bank prevails on this pre-certification motion, both the parties and the court will save significant time and resources in unnecessary litigation. If the bank loses the motion, then this may well promote settlement and, in any event, will narrow the issues to be determined going forward.
>
> I agree with these submissions. […]

[96] The plaintiff submits that by stating "I agree with these submissions", Justice Belobaba was indicating that he had considered the grounds of the defendant's proposed summary judgment motion and concluded that it had merit. I do not agree.

[97] First, para. 17 of his reasons are clear that the issue he considered was whether the proposed summary judgment, if successful, would establish that the "plaintiff's claims (and those of the class) have no merit", to "save significant time and resources in unnecessary litigation." There is no analysis at para. 17 of the merits of the proposed summary judgment motion.

[98] Second, nowhere in his reasons does Justice Belobaba address the merits of the grounds of the proposed summary judgment motion.

[99] Consequently, I find that the approach taken by Justice Belobaba supports the strong presumption (consistent with the comments of the Attorney General) that summary judgment (or other merits-based) motions be scheduled before certification motions, subject to the court's discretion to order that they be heard together if reasons such as those in *Dufault* arise.

[100] The role of the court is to review the proposed summary judgment (or other merits-based) motion to determine whether the requirement of s. 4.1 has been met, so that the merits of the plaintiff's claim can be considered at an early stage before (as the Attorney General stated in his comments) the "expensive and time-consuming" process of certification motions are determined, since class actions often engage "significant and reputational risks for Ontario businesses." It was for that reason that "[W]e are introducing measures that put an emphasis on early motions by the defendant to narrow or dispose of a case before the certification stage."

[101] Further, the plaintiff's approach requiring the court to consider the merits of the proposed summary judgment motion is inconsistent with the scheduling issue before the court. Whether

raised at a case conference or at a contested motion, a court at a scheduling hearing will typically not have any of the materials necessary to assess the merits of the arguments.

[102] The court at a scheduling hearing would expect the defendant to have served a notice of motion and provide it to the court (as in the present case). However, it would not be reasonable to expect that a motion record would be served. The court would not have any affidavit evidence. No factums will have been prepared. The issues on a certification motion are often complex, as in the present case where the court on summary judgment may have to determine (i) statutory jurisdiction under ss. 224.1 and 312 of the *ETA*, (ii) whether s. 153(4) of the *ETA* applies to the Trade In Program, and (iii) whether the action is statute-barred under the *Limitations Act, 2002*.

[103] There may be situations in which the court finds that (i) a defendant is seeking to use scheduling of a summary judgment motion as a "delay tactic" (*e.g.*, if the issue to be resolved is so minor that it does not contribute to resolving the matter) or (ii) the existing or proposed dates for the certification motion and the summary judgment motion are sufficiently close that it makes sense to hear the two motions together. However, neither of those considerations discussed in *Dufault* require a review of the merits of the proposed summary judgment motion.

Application of the law to the present case

[104] Apple has set out the grounds for its motion in its notice of motion and its factum. The plaintiff has responded by setting out its position on the merits of the Apple SJ Motion.

[105] Without considering the merits of either party's position, the plaintiff has not met the burden of establishing that the Apple SJ Motion is merely a delay tactic.

[106] To the contrary, Apple has established that its grounds, if successful, would dispose of the entire case against it.

[107] At para. 26 above, I summarize the grounds relied upon by Apple. Whether based on s. 153(4) of the *ETA*, the *Limitations Act, 2002*, or the alleged statutory immunity under ss. 224.1 and 312 of the *ETA*, all of those grounds are not *prima facie* frivolous. There will certainly be a spirited contest between the parties as to whether any of the grounds raised in the Apple SJ Motion should be accepted by the court. However, while the court will have to decide whether to accept some or all of the Apple submissions on summary judgment, the court should not be commenting, on this scheduling motion, about the strength of either party's position.

[108] Instead, since (i) it is clear that the grounds raised by Apple would dismiss the action if accepted by the court; (ii) there is no basis to find that the Apple SJ Motion is a delay tactic; and (iii) there is no upcoming certification motion date such that the two motions should be heard together, the strong presumption under s. 4.1 of the *CPA* should be followed.

[109] For the above reasons, I order that the Apple SJ Motion be scheduled before the certification motion.

A note on scheduling

[110] At the hearing, I asked the parties to work cooperatively on a scheduling timetable that would result in a hearing of the Apple SJ Motion in the first three months of 2025. The parties agreed to do so. I advised the plaintiff that if he seeks to schedule a cross-motion for summary judgment to address any issues concurrently with those raised by Apple, the parties may provide me with a joint schedule for the delivery of materials if consensus can be reached. Otherwise, I will address further scheduling issues at a subsequent case conference.

ORDER AND COSTS

[111] For the above reasons, I dismiss the plaintiff's stay motion and grant Apple's scheduling motion.

[112] Apple filed a bill of costs at the hearing setting out partial indemnity costs of $23,138.64 on a partial indemnity scale, but advised the court that it was prepared to accept a lower amount, in the court's discretion, as an amount that an unsuccessful party would reasonably expect to pay.

[113] The plaintiff submitted that no costs should be ordered, or in the alternative, costs should be reserved to the summary judgment motion.

[114] In the further alternative, the plaintiff submitted that if costs were to be ordered on the present motions, they should be limited to $5,000 on a partial indemnity scale.

[115] I do not agree with the plaintiff's submissions.

[116] Apple was successful on the stay and scheduling motions and is entitled to its reasonable costs. The material was thoroughly prepared by all parties, with full research and detailed factums. None of these costs will be related to the summary judgment motion, so there is no basis to reserve costs until that hearing. Consequently, I accept Apple's submission and order costs in its favour for the motions.

[117] As to quantum, I find that the $5,000 proposed by the plaintiff is not reasonable. The parties delivered more than 50 pages of factums, with more than 40 cases in support of their submissions. Lengthy preparation was required for the hearing. The issue was important to Apple, as it would otherwise have been faced with the risk of a delay of up to several years if the plaintiff's submissions had been accepted.

[118] On the other hand, the amount of material filed does not merit $23,000 on a partial indemnity scale, which is based on actual costs of almost $40,000. Given the issues before the court and the nature of the material filed, I fix costs at $15,000 (inclusive of taxes and disbursements) on a partial indemnity basis, payable by the plaintiff to Apple within 30 days of these reasons.

GLUSTEIN J.

Date: 20240723

CITATION: Grossman v. Apple Canada Inc., 2024 ONSC 4127
COURT FILE NO.: CV-23-00701250-00CP
DATE: 20240723

ONTARIO

SUPERIOR COURT OF JUSTICE

BORIS GROSSMAN

Plaintiff

AND:

APPLE CANADA INC.

Defendant

REASONS FOR DECISION

Glustein J.

Released: July 23, 2024