IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MONCTON

Kelly Ann Wood v. Desjardins Financial Security Life Assurance Company, et al.
2024 NBKB 076 ***MC/265/2022***

BETWEEN: **KELLY ANN WOOD,**

– and –

DESJARDINS FINANCIAL SECURITY LIFE ASSURANCE COMPANY, ALLSTATE INSURANCE COMPANY OF CANADA, AVIVA GENERAL INSURANCE COMPANY, AIG INSURANCE COMPANY OF CANADA, CAA INSURANCE COMPANY, CO-OPERATORS GENERAL INSURANCE COMPANY, PAFCO INSURANCE COMPANY, INTACT INSURANCE COMPANY, TD HOME AND AUTO INSURANCE COMPANY, SONNET INSURANCE COMPANY, ROYAL & SUN ALLIANCE INSURANCE COPMANY OF CANADA, SECURITY NATIONAL INSURANCE COMPANY, THE PERSONAL INSURANCE COMPANY, PEMBRIDGE INSURANCE COMPANY, and RBC INSURANCE COMPANY OF CANADA

DECISION

BEFORE: Chief Justice Tracey K. DeWare

AT: Moncton, New Brunswick

DATES OF HEARING: February 26, 2024

DATE OF DECISION: April 18, 2024

APPEARANCES:

Michael Dull, for the Plaintiff;
D. Geoffrey Machun & Jason Woycheshyn, for Desjardin Financial & The Personal Insurance Company;
Glenn Zacher, for Allstate Insurance Company, Pafco Insurance Company & Pembridge Insurance Company;
Paul Martin, for Aviva General Insurance;
Matthew Hayes, for AIG Insurance Company;
Jillian Kean, for CAA Insurance Company;
Erin Best & Robert Bradley, for Co-operators General Insurance;
Renée Fontaine, for Intact Insurance Company & Royal & Sun Alliance Insurance Company;
Monica Zauhar, for TD Home and Auto Insurance Company & Security National Insurance Company;
Brenda Lutz, for Sonnet Insurance Company;
Stephen Hutchinson, for RBC Insurance Company.

DEWARE, C.J.

INTRODUCTION

[1] This motion is brought in the context of an action filed pursuant to the ***Class Proceedings Act***, RSNB 2011, c 125. The Representative Plaintiff, Kelly Ann Wood, has filed the action on behalf of a proposed class alleging breach of contract in respect to the potential class members' entitlement to weekly indemnity benefits pursuant to a ***Standard Automobile Policy, the New Brunswick Automobile (Owner) Policy (N.B.F. No. 1)***, Section B. coverage. The proposed class action has yet to be certified. The Representative Plaintiff seeks an order granting leave to amend the Statement of Claim and to add additional parties pursuant to Rule 27.10.

FACTS

[2] The Representative Plaintiff, Kelly Anne Wood, filed her Statement of Claim on May 2nd, 2022. The named Defendants have yet to file their Statements of Defense. The action has been discontinued against two of the Defendants named in the original pleading, RBC Insurance Company of Canada and AIG Insurance Company of Canada.

[3] The Representative Plaintiff seeks to amend the Statement of Claim to add Paula Joanne Sirois as a Representative Plaintiff and to add Definity

Insurance Company, as well as the Wawanessa Mutual Insurance Company as Defendants. The Defendants take no issue with the addition of the two insurers as Defendants. The Representative Plaintiff further seeks to add the additional causes of action of unjust enrichment, bad faith, fraudulent misrepresentation and concealment as well as punitive damages in the Amended Statement of Claim.

[4] The Representative Plaintiff, Kelly Anne Wood, did not reside in New Brunswick at the time the Statement of Claim was filed in May 2022. This fact is salient as the action has been filed as a proposed class action pursuant to the ***Class Proceedings Act (CPA)***. The Defendants raise the issue of the Representative Plaintiff's residence as residency is a condition for certification under the ***CPA***. The Defendants oppose the addition of a new Representative Plaintiff suggesting there is a fatal flaw in the original pleading given its inability to conform with the prerequisites of a class proceeding as set out in the ***CPA***. The Defendants submit the Plaintiff's best court of action would be to file a fresh pleading with an appropriate Representative Plaintiff.

POSITIONS OF THE PARTIES

[5] The Representative Plaintiff suggests there is no true prejudice to these Defendants should the court allow the requested amendments to the Statement of Claim. The Representative Plaintiff points out the pleadings

are not closed, discoveries have yet to take place nor have affidavits of documents been exchanged. The matter has yet to be certified and the certification materials are not yet filed. The Representative Plaintiff argues that in such circumstances there is no prejudice to the Defendants should the amendments be granted given the early stage of the proceedings.

[6] The Defendants agree with the Representative Plaintiff's assessment of the test for an amendment of pleadings and acknowledge the court is to take a liberal approach in the consideration of such requests. However, given the unique circumstances of this matter, the Defendants argue that the amendment of the Statement of Claim to add a new Representative Plaintiff does in fact result in actual prejudice to them.

[7] The Defendants concede that the issue of the original Representative Plaintiff's residency is not appropriately resolved in the context of a request to amend pleadings. The Defendants advise the Court they intend to file a motion as a preliminary step prior to the hearing of the certification motion requesting an order that the action be set aside given its non-compliance with section 3(1) of the ***CPA***. Section 3(1) of the ***CPA*** states as follows:

> 3(1) One member of a class of persons **who are resident in New Brunswick may commence** a proceeding in the court on behalf of the members of that class.
>
> (Emphasis mine)

LAW AND ANALYSIS

[8] The Representative Plaintiff brings the present motion pursuant to Rule 27.10 of the New Brunswick ***Rules of Court***. Rule 27.10 (1) and Rule 27.10 (2) provide as follows:

> 27.10 Amendment of Pleadings
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> General Power of Court
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> (1)**Unless prejudice will result which cannot be compensated for by costs or an adjournment**, the court may, at any stage of an action, grant leave to amend any pleading on such terms as may be just and all such amendments shall be made which are necessary for the purpose of determining the real questions in issue.
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> When Amendments May Be Made
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> (2)A party may amend his pleading
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> (a) without leave, before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action,
>
> (b) on filing the consent of all parties and, where a person is to be added or substituted as a party, the person's consent, or
>
> (c) with leave of the court.
>
> (Emphasis mine)

[9] The Court of Appeal set out how the issues on a request for an amendment pursuant to Rule 27.10 should be framed in ***Triathlon Leasing Inc. v. Juniberry Corp***, [1995] NBJ. No 36. 157 N.B.R. (2d) 217 at paragraphs [30] and [31] as follows:

> 30 These are rules of procedure as opposed to the substantive law which defines substantial legal rights and claims. The rules are the vehicle that enables rights to be delivered and claims to be enforced. **As such, a Court should interpret and apply the rules to ensure, to the greatest extent possible, that there is a determination of the substantive law unless the application of the rules would result in a serious prejudice or injustice. Accordingly, amendments to pleadings are generally allowed**. That is the reason for the use of such phrases as "determining the real questions in dispute" in Rule 27.10 and "just determination of the matters in dispute" in Rule 2.02. As a general

> principle, therefore, the rules of procedure should not be used to prevent the delivery of rights; nor should they be used to preclude the enforcement of claims which are derived from the substantive law.
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> 31 While leave to amend pleadings is a discretionary right, the exercise of that discretion is subject to review on appeal. See *Moore v. State Farm Fire & Casualty Company* (1982), 42 N.B.R. (2d) 667 (C.A.).
>
> (Emphasis mine)

[10] New Brunswick courts have confirmed that a liberal approach must be used in considering requests to amend pleadings. In ***Enbridge Gas New Brunswick Inc. v. Modern Construction***, (1983) Ltd, 2003 NBCA 78 (Canlii), Chief Justice Drapeau, as he then was, commented on the issue at paragraph [15] as follows:

> [15] Rule 27.10 of the Rules of Court provides that unless prejudice will result that cannot be compensated by costs or an adjournment, the court may, in its discretion, grant leave to amend any pleading on such terms as may be just. **The rule in question goes on to obligate the court to allow any amendment that is necessary for the purpose of determining the real questions in issue. The jurisprudence on point supports the view that amendments to pleadings that comply with the rules of pleadings found in Rule 27 should be only very rarely refused.** That approach is shaped by the direction articulated in Rule 1.03, namely that the rules are to be liberally construed to secure the just, least expensive and most expeditious determination of every proceeding on the merits. As well, there is ample authority for the proposition that any decision to allow an amendment to a pleading, being discretionary in nature, calls for the application of a standard of appellate review impregnated with great deference for the judgment exercised in first instance.
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> (Emphasis mine)

[11] The late Justice Walsh of this court considered the nature of prejudice in the context of a request to amend pleadings in ***ALGO Enterprises and NBP Enterprises v. REPAP New Brunswick Inc.***, 2013 NBQB 176 (Canlii) at paragraph 34 as follows:

> [34] In my respectful opinion, prejudice cannot be equated with the other side's disappointment that the claim originally advanced (or was

> perceived to be advanced) was more readily defended in the law, or because of the expense, inconvenience and delay now caused, or, indeed, because of this Court's frustration with the bifurcation of these proceedings and the loss of valuable court time brought on by the inexcusable timing of the Motion. These "unfairness" concerns can be addressed by costs and adjournments. **Rather, it seems to me that the concept of prejudice must mean more than that; it must in some way relate to the ability or, more accurately, the inability to fairly meet the case against them, regardless of when or why advanced**. This point is made by Carthy J.A. for the Ontario Court of Appeal in Kings Gate Developments Inc. v. Colangelo, interpreting a similar provision to that of New Brunswick's:
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> > The unfairness and prejudice to the respondent is manifest. The frustration of a judge, when faced with such a last-minute application, is understandable. Yet rule 26.01 requires that amendments be permitted unless the prejudice cannot be compensated for in costs. The reasons of Chapnik J. speak eloquently as to why it is unfair to request relief, but do not address any item of non-compensable prejudice, such as death of a material witness or destruction of essential files.
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> (Emphasis mine)

[12] The Representative Plaintiff seeks leave to file the Amended Statement of Claim to allege the additional causes of action and to add the additional parties. The request to add a new Representative Plaintiff is in response to the Defendants assertion that the current Representative Plaintiff cannot meet the residency requirements set out in the ***CPA***. The Representative Plaintiff seeks to cure the potential defect in the pleading to accord with the requirements with the ***CPA*** by adding the additional, Representative Plaintiff, Paula Joanne Sirois.

[13] In ***Rose v. New Brunswick*** 2020 NBQB 142, I had the opportunity to consider the issue of adding a new Representative Plaintiff after the original Representative Plaintiff had moved out of the Province of New

Brunswick. In according the request to add the additional Representative Plaintiff in ***Rose***, the circumstances were explained in paragraphs [20] and [21] as follows:

> [20.] The plaintiffs have identified Mr. Jessy Rose as their representative plaintiff, in conformity with section 6(1)(e) of the Act. Currently, Mr. Rose is residing in Quebec, which runs afoul of section 3(1) of the Act. Section 3(1) of the Act states as follows:
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> > 3(1) One member of a class of persons who are resident in New Brunswick may commence a proceeding in the court on behalf of the members of that class.
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> [21.] Mr. Rose was a resident of New Brunswick when the action was filed, but is now residing in Québec. Section 3(1) of the Act requires the representative plaintiff to be a resident of New Brunswick. Mr. Rose no longer meets that requirement. However, Lee Alexander Mitchell, who has filed an affidavit in support of the certification motion is a resident of New Brunswick and the Court was informed is willing to act as the representative plaintiff. In order to comply with Section 3(1) of the Act, Mr. Lee Alexander Mitchell will act along with Mr. Rose as the two named representative plaintiffs in the class proceeding.

[14] The issue in ***Rose*** is distinguishable from the current matter. In ***Rose***, the original Representative Plaintiff was a resident at the time the action was filed. There was no suggestion in ***Rose*** that the addition of the new Representative Plaintiff had an impact in the substantive rights of the Defendants as is alleged in this case.

[15] The Defendants submit that allowing the addition of a new Representative Plaintiff does have substantive consequences for these Defendants as the action has been filed in contemplation of a class proceeding. The commencement of proceedings under the ***CPA*** triggers a statutory suspension of limitation periods. In particular, the Defendants refer the court to section 41(1) of the ***Act*** which states as follows:

> 41(1)Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the proceeding and resumes running against the class member when
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> (a) a ruling is made by the court refusing to certify the proceeding as a class proceeding,
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> (b) the class member opts out of the class proceeding,
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> (c) an amendment is made to the certification order that has the effect of excluding the class member from the class proceeding,
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> (d) a decertification order is made under section 12,
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> (e) the class proceeding is dismissed without an adjudication on the merits,
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> (f) the class proceeding is discontinued with the approval of the court, or
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> (g) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

[16] The Defendants argue that as this action does not comply with the statutory requirements for a class action as set out in the ***CPA***, it will not be certified. However, if the claim is amended to render the pleading compliant with the provisions of the ***CPA***, once the new Representative Plaintiff is included, it prejudices the defendants as they are potentially bound to a period of suspension of a limitation period back to May 2022, even though the action could not have been certified given the fatal flaw of the residency of the Representative Plaintiff.

[17] The present issue before the Court is solely a request to amend pleadings and to add parties. On its face, the motion seeks purely procedural relief. Given the very early stages of the matter, there is no question the Court ought to exercise its discretion and grant leave to file the Amended

Statement of Claim. I can identify no real prejudice to the Defendants by the addition of new causes of action, nor the naming of additional defendants at this point in the litigation. The addition of a second Representative Plaintiff, at this early juncture, would likewise not give pause to the Court were it not for the Defendants' persuasive argument that the addition of the new Representative Plaintiff could cure what is otherwise a fatally flawed pleading, resulting in real prejudice to the Defendants which cannot be compensated via the typical mechanisms of costs or adjournments.

[18] The challenge with the argument raised by the Defendants is that it requires the adjudication of a legal issue, which is now only tangentially before the Court. A determination in this motion that the additional Representative Plaintiff cannot be added as a party requires the Court to accept the Defendants' assertion that the original pleading is fatally flawed without providing an opportunity to the Representative Plaintiff to address that argument head on.

[19] In ***Logan v. Canada (Minister of Health)***, 2003 CarswellOnt 425, [2002 O.J. No. 522, Justice Winkler dealt with a request to substitute an original representative plaintiff for two new representative plaintiffs in the context of a class action. The action had not yet been certified in ***Logan*** as is the case here. The Defendants opposed the amendment to add the new

Representative Plaintiffs on several grounds, including the impact on potential limitation periods. In discussing this issue, Justice Winkler highlighted the following points at paragraphs [5], [9], [10], and [11] as follows:

> [5] The Attorney General opposed the motion for substitution on procedural grounds. He contended that the proper procedure was for the plaintiff Logan to discontinue her action and for Drady and Taylor to commence a fresh action. Although counsel for the plaintiff was prepared to follow this course he was uncertain as to the effect of s. 28 of the Class Proceedings Act, 1992, S.O. 1992, c. 6. **He believed that, pursuant to s. 28 of the CPA, limitation periods had been tolled for the class since the plaintiff Logan commenced the present class proceeding**. The Attorney General advised through counsel that it was his position that s. 28 did not protect putative class members from the running of limitations periods until the proceeding had been certified. Hence, the present motions have been brought.
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> […]
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> [9] **Although the Rules of Civil Procedure R.R.O. 1990 Reg. 194 provide for a liberal approach to amendments to pleadings, it is now settled law that a court should examine proposed amendments to determine if they are tenable at law, rather than merely granting the amendment and thereby inviting a motion to strike to follow in short order**. If the amendment is untenable, leave should not be granted. (See Atlantic Steel Industries Inc. v. CIGNA Insurance Co. of Canada (1997), 1997 CANLII 12125 (ON SC), 33 O.R. (3d) 12 (Gen. Div.), Keneber Inc. v. Midland (Town) (1994), 1994 CANLII 7221 (ON SC), 16 O.R. (3d) 753 (Gen. Div.).)
>
> The Nature of Class Proceedings
>
> [10] The Attorney General maintains that the amendments ought not to be allowed because the proposed substitution is in effect the commencement of a fresh action. I disagree. **The proceeding brought by Logan was an intended class proceeding on behalf of a putative class of plaintiffs. This putative class included both Drady and Taylor. It was sufficiently broad to include the implants with which they are alleged to have been implanted**.
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> [11] The Attorney General, mistakenly in my view, asserts that a class proceeding is not commenced until the action is certified and until that time the proceeding is merely an individual action. This cannot be so. Rule 12 of the Rules of Civil Procedure states that the style of cause must state that the proceeding is commenced under the Class Proceedings Act, 1992. The statute applies with full force and effect from that time forward, triggering the case management functions of the designated class proceedings judge. **Indeed, section 7 of the CPA provides that "where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue**

> **as one or more proceedings between different parties" (emphasis added) subject to such terms as the court may impose. This provision supports the interpretation that a class proceeding is not simply an individual action until certification is granted. Rather it is special type of action, that may be converted, at the court's discretion into a regular individual proceeding.** If the Attorney General were correct in stating that the proceeding were an individual proceeding at the time it is commenced, such a provision would be unnecessary because the action would simply continue as an individual proceeding if certification were denied.
>
> (Emphasis mine)

[20] Justice Winkler in ***Logan*** appears to endorse the interpretation of class proceedings as creating tolling provisions, even before certification, commenting at paragraphs [16], [17], and [23] as follows:

> [16] Further, I do not accede to the submission of the Attorney General with regard to the effect of s. 28 of the CPA . He asserts that the limitation tolling period applicable under s. 28 only begins once an action commenced under the CPA has been certified as a class proceeding. This argument is a variation on the theme of his first point, namely, that the action is a personal action until certified. It is equally untenable. In my view, this construction of the Act requires a narrow and incorrect interpretation of s. 28 that is internally inconsistent with other provisions of the CPA . More importantly, it is contrary to the underlying policy objectives of the Act. It subverts rather than advances the goals of the Act of judicial economy and access to justice.
>
> [17] The pertinent part of s. 28 relied upon by the Attorney General reads “any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding”. The Attorney General asserts that the words “on the commencement of the class proceeding” should be interpreted as meaning when the action is certified as a class proceeding, rather than when the action is commenced by the issuance of a claim or notice of action.
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> […]
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> [23] Although no authority is cited by these authors, their conclusions are eminently sensible. The CPA is remedial legislation aimed at providing judicial economy for the court system and access to that system for plaintiffs with non-economic claims. If potential class members are forced to commence individual actions while awaiting certification of class proceeding to protect individual limitation periods, it would defeat these purposes. The court system could be potentially burdened with volumes of claims, all of which would be redundant should the proceeding be certified as a class proceeding. Further, requiring each class member to file an individual claim could go a long way

> toward eliminating the economic advantage of class proceedings for any class member with a small claim.

[21] In ***Logan***, Justice Winkler accorded the request to add the new Representative Plaintiffs. ***Logan*** does not deal with the precise issue involved in this case, the residency of the Representative Plaintiff, pursuant to the ***CPA***. However, it underscores the importance of the issue raised by the Defendants concerning potential limitation periods, and highlights various factors the Court should consider.

[22] Justice Winkler in ***Logan*** highlighted the precise procedural road map which is likely to occur in this case. Justice Winkler asserts that the pleadings should be assessed to determine "*if they are tenable at law*" in order to avoid a situation where the amendment is granted, only to be challenged by a motion to strike. The Defendants in this case have already alerted the Court of their intention to file a motion requesting a preliminary determination prior to the hearing of the certification motion that the Statement of Claim is fatally flawed as a result of the residency requirements. This is exactly the procedural two-step Justice Winkler sought to avoid in ***Logan***. However, in this case, to determine at this stage that the amendment of the Statement of Claim ought to be rejected as it cures an otherwise fatal flaw in the action is a substantive issue. In my view, such an issue cannot be resolved in the context of this procedural motion with a limited evidentiary record.

CONCLUSION AND DISPOSITION

[23] For all the aforementioned reasons, the motion is granted. The Representative Plaintiff may file the Amended Notice of Action with Amended Statement of Claim Attached as submitted with the Notice of Motion dated November 8, 2023, including the addition of Paula Joanne Sirois as a Plaintiff and Definity Insurance Company, and the Wawanesa Mutual Insurance Company as Defendants. In all the circumstances, there shall be no order as to costs.

DATED at Moncton, New Brunswick this 18th day of April, 2024.

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Tracey K. DeWare,
Chief Justice of the Court of King's Bench
of New Brunswick