COURT OF APPEAL FOR ONTARIO

CITATION: Locking v. Armtec Infrastructure Inc., 2012 ONCA 774
DATE: 20121114
DOCKET: C54955

Armstrong, Watt and Pepall JJ.A.

BETWEEN

Keith Locking

Plaintiff (Appellant)

and

Armtec Infrastructure Inc., Scotia Capital Inc., TD Securities Inc., BMO Nesbitt Burns Inc., Charles M. Phillips, James R. Newell, Robert J. Wright, Ron V. Adams, Don W. Cameron, Brian W. Jamieson, John E. Richardson and Michael S. Skea

Defendants

Proceedings under the *Class Proceedings Act*, *1992*

AND BETWEEN

Bruce Simmonds, Robert Grant and Gordon Moore

Plaintiffs (Respondents)

and

Armtec Infrastructure Inc., Charles M. Phillips, James R. Newell, Michael S. Skea, Donald W. Cameron, Scotia Capital Inc., TD Securities Inc. and BMO Nesbitt Burns Inc.

Defendants

Proceedings under the *Class Proceedings Act*, *1992*

Earl A. Cherniak, Q.C., for Siskinds LLP, counsel to the plaintiff/appellant Keith Locking

Paul J. Pape and David S. Steinberg, for Sutts, Strosberg LLP, counsel to the plaintiffs/respondents Bruce Simmonds, Robert Grant and Gordon Moore

Heard: May 22, 2012

On appeal from the order of Justice Bruce G. Thomas of the Superior Court of Justice, dated January 20, 2012.

By the Court:

Background

[1] Bruce Simmonds, Robert Grant and Gordon Moore commenced proceedings against Armtec Infrastructure Inc. and others ("the Simmonds action") under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("the Act"). Their counsel is Sutts, Strosberg LLP. So did Keith Locking ("the Locking action"). His counsel is Siskinds LLP. The plaintiffs in the two actions each sought to have carriage of the class action.

[2] On January 20, 2012, the motion judge ordered that:

- the motion for carriage made by the plaintiffs in the Simmonds action be granted;
- the motion for carriage made by the plaintiff in the Locking action be dismissed; and
- the Locking action be stayed.

[3] Keith Locking appealed that order to the Court of Appeal.

[4] This court subsequently advised the parties that it had concluded that it did not have jurisdiction to hear this appeal and that the appeal lay to the Divisional Court with leave. These are the reasons for that decision.

Scheme of the Act

[5] The majority of appeals under the Act are to the Divisional Court. This is the legislative scheme. So, for example, appeals from a certification order or a refusal to certify are to the Divisional Court. Numerous decisions involving appeals to the Divisional Court in class proceedings reflect this scheme: see e.g. *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 (Div. Ct.), aff'd (2003), 63 O.R. (3d) 22 (C.A.); *Markson v. MBNA Canada Bank* (2005), 78 O.R. (3d) 39 (Div. Ct.), aff'd (2007), 85 O.R. (3d) 321 (C.A.); *Irving Paper Ltd. v. Atofina Chemicals Inc.*, 2010 ONSC 2705, 103 O.R. (3d) 296; *Fischer v. IG Investment Management Ltd.*, 2011 ONSC 292, 104 O.R. (3d) 615 (Div. Ct.), aff'd 2012 ONCA 47, 109 O.R. (3d) 498.

[6] Under s. 30(3) of the Act, only appeals from a judgment on common issues or a final order that deals with the aggregate assessment of monetary relief are expressly stated to be to the Court of Appeal.

[7] In *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372, this court

noted that under the Act, rights of appeal to the Court of Appeal are set out in s. 30(3) of the Act. In that case, the court stated that s. 30(3) took precedence over and excluded provisions of general application such as s. 6(1)(b) of the *Courts of Justice Act,* R.S.O. 1990, c. C.43. This commentary was in the context of a representative plaintiff's motion to quash an appeal of a certification order and settlement approval order that had been brought by a class member. The appeal was quashed on the basis that the class member was not a party to the proceeding and, based on s. 30(3) which speaks of a party's right to appeal, had no standing to bring the appeal. The class member unsuccessfully attempted to rely on s. 6(1)(b) of the *Courts of Justice Act*, which permits appeals to the Court of Appeal from a final order of the Ontario Court (General Division) (now the Superior Court of Justice). As the specific provisions of the Act confer a right of appeal to the Court of Appeal on a party and not on a class member, they took precedence over the more general language found in s. 6(1)(b) of the *Courts of Justice Act*, which was also an earlier statute.

Courts of Justice Act

[8] Where the Act does not specifically address the rights and avenues of appeal, s. 6(1)(b) of the *Courts of Justice Act* governs appeals to the Court of Appeal in class proceedings. It states that an appeal lies to the Court of Appeal from a final order of a judge of the Superior Court of Justice, except an order

referred to in clause 19(1)(a) or an order from which an appeal lies to the Divisional Court under another Act.

[9] The distinction between a final and interlocutory order was described by Justice Middleton in *Hendrickson v. Kallio*, [1932] O.R. 675 (C.A.), at p. 678:

> The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties – the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the application, but it is interlocutory if the merits of the case remain to be determined.

[10] So, for example, an appeal in a class proceeding from an order striking out a statement of claim as disclosing no reasonable cause of action is to the Court of Appeal. So too is an appeal from an order for summary judgment in which a class proceeding is dismissed.

This Appeal

[11] As a carriage order is not specifically addressed in the Act, the *Courts of Justice Act* governs the appeal route in this case. As such, the issue before us is whether the motion judge's order was final or interlocutory. In our view, it was interlocutory.

[12] While this court has not addressed this issue before, some other jurisdictions in Canada have.

[13] The Court of Appeal for British Columbia in *W.(A.) (Litigation Guardian of) v. British Columbia*, 2003 BCCA 448, 17 B.C.L.R. (4th) 263, and the Court of Appeal for Newfoundland and Labrador in *H.P. Management Inc. v. Newfoundland and Labrador (Minister of Finance)*, 2007 NLCA 65, 270 Nfld. & P.E.I.R. 277, both held that an order granting carriage of a proposed class action was interlocutory in nature and not final, and that in their jurisdictions, leave to appeal was therefore required. Those cases both involved stays of the action of the unsuccessful party on the carriage motion. Both courts held that the order staying the action did not bring an end to the proceedings, as the action was not stayed for all purposes, but simply as a class action. The unsuccessful plaintiffs could still prosecute their lawsuit as an ordinary action. Furthermore, if the plaintiff with carriage succeeded in obtaining certification, the unsuccessful plaintiffs could opt out of the class and continue with their own action. The only effect of the impugned order was to prevent the unsuccessful plaintiffs from bringing an application to have the action certified as a class proceeding.

[14] As noted at para. 17 of *H.P. Management Inc*., the stay of proceedings did not determine or terminate the claim: “The effect is simply to place the claim on hold until the rights of the class have been determined through the representative plaintiff.”

[15] While in the appeal before us, the motion judge did not expressly state that the Locking action was stayed for the purposes of the class action only, this was

implicitly the case. As such, the order was interlocutory. Furthermore, to the extent possible, there is some advantage to uniformity of approach in class proceedings in Canada.

[16] The cases relied upon by the appellant are distinguishable from the case before us. Some dealt with stays based on *forum non conveniens* or arbitration. These decisions involved access to the court system or the disposition of a substantial issue forming part of the dispute between the parties, not the format by which an action would proceed through the court system.

[17] The appellant has not lost his right to sue the defendants. He may remain as part of the proposed class action and may also seek to actively participate to protect his interests pursuant to s. 14 of the Act. He may also opt out and pursue his individual action independently.

[18] For these reasons, we conclude that the motion judge's order is interlocutory. An appeal lies to the Divisional Court with leave and not to the Court of Appeal.

[19] Neither party before us raised the issue of jurisdiction, nor objected to the appeal proceeding in this court. In all of the circumstances, we are of the view that there should be no order of costs of this appeal.

"Robert P. Armstrong J.A."
"David Watt J.A."
"S.E. Pepall J.A."

Released: November 14, 2012 "DW"