CITATION: Bowman v. Ontario, 2024 ONSC 1327
COURT FILE NO. CV-19-00000036-00CP
DATE: 20240304

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Dana Bowman, Grace Marie Doyle Hillion, Susan Lindsay and Tracey Mechefske	)	Stephen Moreau and Kaley Duff, for the plaintiffs
Plaintiffs	)	
– and –	)	
	)	
His Majesty the King in Right of Ontario	)	Judie Im and Adam Mortimer, for the defendant
Defendant	)	

Heard: September 28, 2023

S.T. BALE J.

Introduction

1. This action is for damages the plaintiffs allege were suffered as a result of the early termination of a basic income pilot project established by the Government of Ontario in 2017.

2. The plaintiffs moved for an order certifying the action as a class action, under the *Class Proceedings Act, 1992.*

3. The class is defined to be: "All persons who were enrolled by the Defendant in the Basic Income Pilot Project as part of the Payment Group."

4. Following the initial hearing, I dismissed the certification motion, finding that none of the claims pleaded by the plaintiffs raised a reasonable cause of action.

5. The plaintiffs appealed my decision; and, in the result, the Court of Appeal held that the plaintiffs' pleading in contract supported a reasonable cause of action. The court then remitted the issues of commonality and preferable procedure to this court for determination.

6. In the meantime, the plaintiffs amended their statement of claim to plead an additional cause of action in unjust enrichment. Ontario concedes that the pleading of this new claim discloses a cause of action. Accordingly, the issues to be determined are whether the claims in contract and unjust enrichment raise common issues, and whether a class proceeding is the preferable procedure for resolution of those issues.

7. The facts of the case are set out in my reasons on the original certification motion, and in the reasons of the Court of Appeal, and need not be repeated here: see *Bowman v. Ontario,* 2020 ONSC 7374, and *Bowman v. Ontario,* 2022 ONCA 477, 162 O.R. (3d) 561.

Whether the claims in contract and unjust enrichment raise common issues

8. The common issues criterion under s. 5(1)(c) of the Act presents a low bar. It is not necessary that the common issues dispose of the litigation. What is required is that the common issues be issues of fact or law common to all claims, the resolution of which will advance the litigation. The standard of proof is that there be some basis in fact to support the plaintiffs' position: *Heller v. Uber Technologies Inc,* 2021 ONSC 5518, at paras. 185-186.

Proposed common issues – breach of contract

9. The following are the proposed common issues relating to the claim for breach of contract:

> 1. Did the Defendant enter into a contract with the Class Members for the provision of BI Payments to each Class Member for a three-year period commencing on the date each Class Member received their first payment or, alternatively, for a three-year period associated with the operation of the BI Pilot?
>
> 2. If the answer to question 1 is yes, did the Defendant owe contractual duties and/or a duty of good faith to ensure that the Class Members were provided with BI Payments during the salient three-year period?
>
> 3. If the answers to question 1 and 2 are "yes", did the Defendant breach any of its contractual duties and/or a duty of good faith? If so, how?

10. The plaintiffs argue that there is a common contract with a common factual matrix. They plead that Ontario entered into a contract with class members for the provision of basic income payments to each class member for a three-year period, commencing on the date each received their first payment. The contract resulted from an offer by Ontario to the class of "the benefit of BI Payments in exchange for their acceptance, by way of signature, which acceptance was given, resulting in the formation of a contract." The core contractual documents are said to be the "Information Booklet" and an application form. In addition to those two core documents, the plaintiffs rely upon a government web site referred to in the information booklet, a speech made by then Premier Wynne, a report prepared by Hugh Segal, news releases, and several other documents.

11. Although one might have thought that answers to the questions of whether there was a contract, what the contract terms required Ontario to do, and whether Ontario fulfilled those requirements, would significantly advance the litigation, one way or the other, Ontario's position is "that the proposed common issues are not common and those that are do not significantly or meaningfully advance the litigation."

12. Ontario argues that the determination of liability for each class member will require "an individualized assessment", and that therefore, liability is not a common issue. In support of that argument, Crown counsel refers to the fact that some members of the class may have become ineligible to receive payments, sometime during the three years following the receipt of their first payment, because they have moved outside Ontario, turned 65, their marital status has changed,

their income has changed, they have died, or for some other reason related to the conditions of eligibility. Ontario also argues that eligibility goes to the question of breach, since Ontario cannot be found to have breached a contract with someone who was no longer eligible to receive payments.

13. The plaintiffs argue that the issue of eligibility goes to damages – the class members may be entitled to different amounts or possibly nothing, as a result of changes in eligibility – and rely on para. 1 of s. 6 of the Act which provides that the court shall not refuse to certify a proceeding solely because the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues. I agree.

14. In any event, even if the eligibility requirements are found to relate to breach and liability, as Ontario argues, it does not follow that there are no common issues. There is no requirement that every aspect of liability be dealt with in common; and it cannot be argued that the litigation would not meaningfully be advanced by answers to the questions of whether there was a contract, whether the contract required payments to be made for three years to eligible class members, and whether Ontario failed to make those payments. If those determinations were made, it would then be a routine matter for each class member to prove that they did not die or reach the age of 65, or that their marital status had not changed, *etc*. The required information could probably be made available to Ontario by the Canada Revenue agency, with the consent of class members, as it was during the currency of the pilot.

15. Unlike typical contract cases, the largest question in the lawsuit is whether there even was a contract. If the court were to find that there was, one would expect some very meaningful settlement discussions to follow.

16. Relying on *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.,* 2016 SCC 37, Ontario argues that because the alleged contract in this case is a standard form contract (in the sense of it being put to the class members as a "take it or leave it proposition"), it can have no meaningful factual matrix or surrounding circumstances.

17. However, while the court in *Ledcor* comments on the fact that the factual matrix is "often less relevant" *(e.g.*, at para. 28), *Ledcor* is not a case about whether or the extent to which surrounding circumstances may be considered in interpreting standard form contracts. Surrounding circumstances that may be considered are relevant facts that were known or reasonably ought to have been known by both parties at or before the date of contracting: *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53, at para. 60. In any particular case, the surrounding circumstances will be whatever they are found to be. For the purposes of certification, the issue is whether the surrounding circumstances are common across the members of the class. For an example of a standard form contract case where there were surrounding circumstances and the action was certified, see *De Wolf v. Bell Expressvu Inc.*, 2008 CanLII 5963 (ON SC). In the present case, the plaintiffs do not rely upon any surrounding circumstances not common across the members of the class.

18. Ontario goes on to argue that in the present case, the plaintiffs have expanded the factual matrix "beyond … anything that is reasonable." Ontario seeks to limit, at this stage, the surrounding circumstances that the plaintiffs may rely upon.

19. Counsel argues that there is no basis in fact to conclude that the surrounding circumstances relied on by the plaintiffs reasonably "ought to have been within the knowledge of the parties." However, there is evidence that knowledge of those circumstances was readily available to the parties; whether those circumstances ought reasonably to have been within their knowledge is a question for the trial judge.

20. In answer to a question from the bench as to whose job it is to determine whether a particular surrounding circumstance should be considered – the certification judge or the trial judge - Crown counsel answered "both" and said that it is for me to determine whether the surrounding circumstances relied upon by the plaintiffs are both relevant and common to the parties. However, in making that argument, counsel is asking me to delve into the merits of the claim which are not in issue at the certification stage. While I agree that the factual matrix must be common, it is for the trial judge to determine whether there was a contract, and the terms of the contract, including whether any particular surrounding circumstance is relevant to interpretation of the contract.

Proposed common issues – unjust enrichment

21. The following are the proposed common issues relating to the claim for unjust enrichment:

> 4. Was the Defendant unjustly enriched by the Class Members' actions in response to their enrolment in the BI Pilot?
>
> 5. If the answer to question 4 is "yes", did the Class suffer a corresponding deprivation?
>
> 6. If the answer to questions 4 and 5 are "yes", was there no juristic reason for the enrichment?

22. Ontario concedes that if I find that the plaintiffs' claim in contract raises common issues, I should make the same finding in relation to the claim in unjust enrichment.

23. For the reasons given, I find that the statement of claim satisfies the common issues criterion under s. 5(1)(c) of the Act, and certify proposed common issues 1, 2, 3, 4, 5 and 6.

Whether a class proceeding is the preferable procedure for resolution of the common issues

24. In Ontario's factum, a preferable procedure to a class action for litigation of the plaintiffs' claims was not identified. Rather, it was argued only that a class action would not be fair, efficient and manageable. In oral argument, however, counsel argued that 4,000 small claims court actions would be the preferable procedure. I disagree, for the following reasons.

25. First, Ontario has not explained how the Small Claims Court in this region would manage the addition of 4,000 claims to its docket.

26. Second, the determination of individual issues in this case may require the participation of individual class members. In such cases s. 25(3) of the Act affords the court wide latitude to provide for the least expensive and most expeditious method of determining the issues, including, dispensing with unnecessary procedural steps and authorizing any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate. This wide procedural latitude is not available in Small Claims Court.

27. Third, and perhaps most importantly, for all the reasons the pilot project was established in the first place, members of this class are vulnerable members of an impoverished group, who would be unable to afford litigation against the Province of Ontario.

Aggregate damages

28. Proposed common issue number 7 is: "Can the court make an aggregate assessment of damages suffered by all class members as part of the common issues trial?"

29. While there may be cases where it is appropriate for the question of aggregate assessment of damages to be certified as a common issue, it is not necessary to do so. The trial judge has jurisdiction under s. 24 of the Act to make an aggregate assessment: *Loveless v. Ontario Lottery and Gaming Corporation,* 2011 ONSC 4744, at para. 70.

30. Ontario's position with respect to aggregate damages is that on the evidence now before the court, there is no reasonable likelihood that the plaintiffs will be able to satisfy the requirements of s. 24(1) of the Act. Counsel argues that the issue of aggregate damages should be left for the trial judge who will have a firmer factual record on aggregation issues.

31. Counsel for the plaintiff acknowledges that on the facts of this case, it is unlikely to make any difference to class members whether the question is certified now or is left for the trial judge. Counsel also acknowledges that the trial judge may be in a better position to determine whether the requirements of s. 24(1) of the Act are met.

32. In my view, in the absence of a particular proposal for aggregation, the question as framed adds nothing to the analysis at this stage of the proceeding.

33. In the result, the aggregate damages question will not be certified.

Administration costs

34. Proposed common issue number 8 is: "Should the Defendant pay the costs of administering and distributing recovery to the class?"

35. The plaintiffs did not address this issue in oral argument.

36. I agree with Ontario that the costs of distribution of damages is a matter in the discretion of the court pursuant to s. 26(9) of the Act, and that proposed common issue 8 is not a basis for certification.

Litigation plan

37. Counsel on both sides agree that the litigation plan is a work in process and ask that for the present, it be left to them to work it out together, subject to a right to return to court for resolution of any issues they are unable to agree on.

Disposition

38. For the reasons given, I certify the proposed common issues relating to the plaintiffs' contract and unjust enrichment claims, but not those relating to aggregate damages or costs of administration.

39. I ask that counsel endeavour to agree on costs and a draft order. If they are unable to do so, they may contact me through my judicial assistant, with suggestions for resolution of those issues.

Released: March 4, 2024

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SUPERIOR COURT OF JUSTICE

DANA BOWMAN and others

Plaintiffs

– and –

HIS MAJESTY THE KING
IN RIGHT OF ONTARIO

Defendant

REASONS FOR DECISION

S.T. BALE J.

Released: March 4, 2024