

Ward-Price v. Mariners Haven Inc.

SCAN/2002-113

Full text: [2002] O.J. No. 4260

**Ontario Superior Court of Justice
Nordheimer J.**

November 5, 2002

FACTS:

This class proceeding was commenced by the purchaser of a condominium pursuant to the Condominium Act to recover interest payable on her deposit, as well as on the deposits paid by other members of the proposed class. The claim is founded on the allegation that s. 53(1) of the Condominium Act, imposes a statutory trust on the interest payable on all money received by the developer on account of the purchase price and that the developer was in breach of trust by failing to pay interest on the money received by it. The defendant developer issued a third party claim against a law firm seeking contribution and indemnity. The third parties defended on the basis that the Condominium Act does not impose a trust obligation on the interest payable. Cumming J. agreed with the third parties and issued summary judgment dismissing the claim to the extent that it was based on breach of trust. The order was reversed on appeal.

ISSUE:

The plaintiff moves to certify this action as a class proceeding.

HELD:

Certification granted. If parties cannot resolve cost issues, they may make written submissions on the appropriate disposition.

REASONS:

While the third parties ultimately were permitted to make submissions, the court remained unconvinced that third parties have standing to make submissions at a certification hearing.

As the defendants did not challenge the section 5(1)(a) and (b) requirements, the court found that it was not necessary to address those requirements.

Depending on the resolution of the common issues, individual issues may still need to be determined. That fact does not preclude the certification of an action as a class proceeding. The determination of the common issues will advance the litigation significantly. With some amendments to the proposed common issues, the common issue requirement has been met.

The determination of the common issues on behalf of all twenty-four members of the proposed class realizes an economy over having those issues determined individually. The mere possibility that some of the already small class may opt-out is an insufficient reason to deny certification. Determination on behalf of 24 class members would realize judicial economy. The denial of certification would not, however, constitute a denial of access to justice. There is little behaviour modification that could be accomplished with respect to the defendants as the corporate defendants are insolvent. However, the conduct of officers and directors of those companies would properly be the subject of behaviour modification if the allegations made by the plaintiff are proven. Two of the three goals of a class proceeding would be accomplished by a class proceeding.

The proposed representative plaintiff would adequately and fairly represent the interest of the proposed class. There is a litigation plan proposed that sets out a workable plan for advancing the proceeding.

Note: This digest also was reported in the Siskinds Class Action NetLetter, Issue 29, posted December 10, 2002.