CITATION: ALS Society of Essex County v. Windsor and Tecumseh, 2016 ONSC 1929
DIVISIONAL COURT FILE NO.: 92/16
DATE: 20160324

SUPERIOR COURT OF JUSTICE – ONTARIO

DIVISIONAL COURT

Between: Amyotrophic Lateral Sclerosis Society of Essex County, Plaintiff/ Respondent on Appeal /Cross-Appellant

AND:

The Corporation of the City of Windsor, Defendant/Appellant/ Respondent on the Cross-Appeal

AND BETWEEN:

Belle River District Minor Hockey Association Inc., Essex County Dancers Incorporated, Plaintiffs/Respondents on the Appeal/Cross-Appellants

AND:

The Corporation of the Town of Tecumseh, Defendant/ Appellant/ Respondent on the Cross-Appeal

BEFORE: Aston, Swinton and Pattillo JJ.

COUNSEL: *Scott Hutchison* and *Brendan Van Niejenhuis.*, for the Defendants/ Appellants/Respondents

Peter Kryworuk and *Brian N. Radnoff*, for the Plaintiffs/Respondents/ Cross-Appellants

HEARD at Toronto: March 15, 2016

ENDORSEMENT

L. A. Pattillo J.

Introduction

[1] The Corporations of the City of Windsor ("Windsor") and the Town of Tecumseh ("Tecumseh") (collectively the "Appellants") each move for leave to appeal and, if granted, appeal the orders of Patterson J. (the "Case Management Judge") dated January 29, 2016 (the "Orders").

[2] At the same time, the Amyotrophic Lateral Sclerosis Society of Essex County ("ALS Society") and the Belle River District Minor Hockey Association Inc. ("Belle River Hockey") and Essex County Dancers Incorporated ("Essex Dancers") (collectively the "Respondents") each move for leave to cross-appeal and if granted, cross-appeal from the Orders.

[3] The Orders, among other things, require the Appellants to cease and desist all further communications intended to persuade class members to opt-out of the Respondents' class actions.

[4] On February 12, 2016, Marrocco ACJO ordered, among other things, that the motions for leave to appeal and the appeals be heard together.

[5] Further, in connection with both the appeal and cross-appeal, the Respondents have brought a motion to admit fresh evidence.

Overview

[6] In 2008, the ALS Society commenced a class action against Windsor and Belle River Hockey and Essex Dancers commenced a class action against Tecumseh. Both class actions claim recovery of lottery licensing and administration fees paid to Windsor and Tecumseh dating back to 1993. According to the Appellants, the amount in issue is in excess of $70 million for Windsor and $7 million for Tecumseh. The actions are being managed by the Case Management Judge.

[7] The class actions were certified by order dated December 31, 2012 and varied by the Court of Appeal on August 12, 2015. On December 17, 2015 the form, content and timing of the Notices of Certification were approved by the Case Management Judge. Public dissemination of the Notices of Certification took place on January 16, 2016 through publication in the Windsor Star. The Opt-Out period began on the same day and is set to expire on May 15, 2016 at 12:00 a.m.

[8] Also on January 16, 2016, the Appellants began what they refer to as an "awareness-raising campaign" and what the Respondents call an "opt-out campaign." The Appellants' communications included an 8 a.m. press release on January 16, full page colour newspaper ads, billboard ads, radio ads, interviews with both mayors on local radio, television and other media outlets, social media posts using the Appellants' Facebook and Twitter accounts, direct mailings to class members and a website. The campaign is directed to urging class members to opt-out of the class actions.

[9] On January 25, 2016, the Respondents brought an urgent motion before the Case Management Judge seeking relief to contain and remediate what they submitted was the harm caused by the Appellants' opt-out campaign.

The Case Management Judge's Reasons

[10] In reasons dated January 29, 2016, (2016 ONSC 676), the Case Management Judge, after briefly setting out the facts and the applicable legal principles concerning when intervention by the court is warranted pursuant to s. 12 of the *Class Proceedings Act*, 1992, S.O. 1991, c.6, ("CPA"), sets out seven concerns arising from the Appellants' campaign.

[11] After setting out the positions of both the Appellants and the Respondents, the Case Management Judge states at par. 37:

> [37] I accept the submission from counsel for the Town and the City that their intent was to inform potential claimants in this class action so that they would know the consequences of a large award being potentially made in favour of the plaintiffs, with the ensuing consequences to the municipality to be obligated to pay the same. I must balance that intent with what appears to be an aggressive multi-media opt-out campaign that in effect pitted one taxpayer against another or one organization against another, in order for them not to pursue a valid claim. I understand the City and the Town's submission that the consequences of a large award of damages against them will have consequences to taxpayers of the Town and City but, in my opinion, they went too far and that its effect created "undue influence".

[12] The Case Management Judge further concluded, given the Appellants' legal right to communicate with potential claimants and the potential consequences of a successful action, that the Respondents had also gone too far in their request to restrict the Appellants' communications.

[13] The Orders provide, among other things, that there shall be no further information from the Appellants concerning the opt-out campaign; the information and communications about the opt-out campaign that already exist may remain; any potential claimants who opted out shall have an opportunity to reconsider their position at the end of the opt-out period in a manner to be decided; and the Appellants' websites shall contain a hyperlink to the class actions web sites.

The Appeal and Cross-Appeal

[14] The Appellants submit, among other things, that the Case Management Judge erred in law in finding that their communications created "undue influence". They seek an order setting aside the Orders and dismissing the Respondents' motion.

[15] The Respondents' cross-appeal concerns the adequacy of the remedial relief granted by the Case Management Judge. The Respondents submit that, in spite of his

findings concerning the effect of the Appellants' opt-out campaign, the Case Management Judge granted limited relief and did not order the Appellants to discontinue and remove the existing inappropriate communications.

Leave to Appeal

[16] The test for granting leave to appeal under rule 62.02(4) is well-settled. It is recognized that leave should not be easily granted and the test to be met is a very strict one. There are two possible branches upon which leave may be granted. Both branches involve a two-part test and, in each case, both aspects of the two-part test must be met before leave may be granted.

[17] Under rule 62.02(4)(a), the moving party must establish that there is a conflicting decision of another judge or court in Ontario or elsewhere (but not a lower level court) and that it is, in the opinion of the judge hearing the motion, "desirable that leave to appeal be granted." A "conflicting decision" must be with respect to a matter of principle, not merely a situation in which a different result was reached in respect of particular facts: *Comtrade Petroleum Inc. v. 490300 Ontario Ltd.* (1992), 7 O.R. (3d) 542 (Div. Ct.).

[18] Under rule 62.02(4)(b), the moving party must establish that there is reason to doubt the correctness of the order in question and that the proposed appeal involves matters of such importance that leave to appeal should be granted. It is not necessary that the judge granting leave be satisfied that the decision in question was actually wrong – that aspect of the test is satisfied if the judge granting leave finds that the correctness of the order is open to "very serious debate": *Nazari v. OTIP/RAEO Insurance Co.*, [2003] O.J. No. 3442 (S.C.J.); *Ash v. Lloyd's Corp.* (1992), 8 O.R. (3d) 282 (Gen. Div.). In addition, the moving party must demonstrate matters of importance that go beyond the interests of the immediate parties and involve questions of general or public importance relevant to the development of the law and administration of justice: *Rankin v. McLeod, Young, Weir Ltd.* (1986), 57 O.R. (2d) 569 (H.C.J.); *Greslik v. Ontario Legal Aid Plan* (1988), 65 O.R. (2d) 110 (Div. Ct.).

Analysis

[19] As noted, the Case Management Judge set out the applicable legal principles concerning the use of s. 12 of the CPA to restrict communication during the opt-out period. Neither the Appellants nor the Respondents have pointed to any cases which set out conflicting principles to those identified and relied upon by the Case Management Judge. Rather, their complaint is the application of the facts to those principles. Therefore, rule 62.02(4)(a) does not come into play.

[20] Nor in my view, having regard to all of the circumstances is there any reason to doubt the correctness of the Case Management Judge's decision. Given the nature and the number of the concerns with the Appellants' communications identified by the Case Management Judge, in my view his finding of "undue influence" was correct.

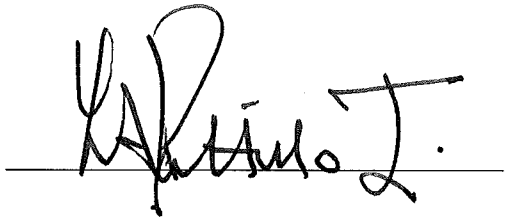
[21] Further, the question of remedy is a matter of discretion. Given the circumstances including the nature and extent of the existing communications and the fact that the genie was out of the bottle, so to speak, in my view the remedy fashioned by the Case Management Judge was both appropriate and correct in the circumstances. Accordingly, there is also no reason to doubt the correctness of the Case Management Judge's remedy.

Conclusion

[22] For the above reasons therefore, neither the Appellants nor the Respondents have satisfied either of the two tests for leave set out in rule 62.02(4). Accordingly, both the Appellants and the Respondents leave to appeal motions are dismissed.

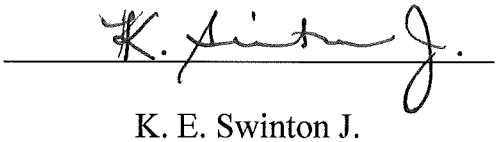
[23] In light of my decision, there is no need to consider the Respondent's fresh evidence motion. In any event, in my view, the issues raised by it are more properly dealt with by the Case Management Judge.

[24] The parties have agreed that the winner of the appeal should receive $25,000 in costs. As none of the parties were successful on the motion for leave or the appeal, there will be no order as to costs.



L. A. Pattillo J.

D. R. Aston J.



K. E. Swinton J.

Date of Release: MAR 24 2016