CITATION: Maginnis v. FCA Canada Inc., 2021 ONSC 3897
DIVISIONAL COURT FILE NO.: 448/20
DATE: 20210531

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Swinton, Sachs and Lococo JJ.

BETWEEN:	
ROBERT MAGINNIS and MICHAEL B. MAGNAYE	*David Sterns, Mohsen Seddigh, Daniel E.H. Bach, Eva Markowski, and Stefani Cuberovic*, for the Plaintiffs (Appellants)
Plaintiffs (Appellants)	
– **and** –	
FCA CANADA INC., FCA US LLC, ROBERT BOSCH INC., ROBERT BOSCH GMBH, ROBERT BOSCH LLC, and SCARSVIEW MOTORS LTD.	*Peter J. Pliszka, Antonio Di Domenico, Zohaib I. Maladwala, and Caroline Youdan*, for the FCA Defendants (Respondents) *Robert E. Kwinter and Nicole Henderson*, for the Bosch Defendants (Respondents) *Robert Bell and Rebecca Shoom*, for the Defendant Scarsview Motors Ltd. (Respondent)
Defendants (Respondents)	
	HEARD at Toronto (by videoconference): April 29, 2021

Swinton J.:

Overview

[1] Robert Maginnis and Michael Magnaye appeal from the order of Belobaba J. dated September 18, 2020 (2020 ONSC 5462) dismissing their motion for certification of a class proceeding. The proposed class proceeding arises from allegations that emissions "defeat devices"

were installed by the Fiat Chrysler Automobile ("FCA") respondents in certain diesel-engine vehicles that permitted the engines to cheat government emissions tests.

[2] The motions judge denied the motion for certification on the basis that a class proceeding was not a preferable procedure, given that there was no evidence that any individual in the proposed class suffered a compensable loss following FCA's recall and repair of the vehicles. The appellants argue that the motions judge erred in law by requiring them to prove loss at the certification stage, and he also erred in deciding contested facts and the merits of the claim at the certification stage.

[3] For the reasons that follow, I would dismiss the appeal, as the motions judge did not err in law or make any palpable and overriding error in his treatment of the evidence. His decision on the preferability criterion was a reasonable exercise of his discretion.

The Factual Background

[4] Both appellants purchased Jeep Grand Cherokees with "EcoDiesel" engines. The vehicles were built by FCA. The Robert Bosch respondents designed and supplied the emission control devices installed in the vehicles.

[5] In early 2017, the United States Environmental Protection Association ("EPA") and its California equivalent, the California Air Resources Board ("CARB"), issued notices of violation to FCA in the United States relating to the installation of software "defeat devices" in certain eco-diesel vehicles. The devices enabled a vehicle to detect if it was undergoing an emissions test and to alter its performance so the engine did not emit excessive diesel pollutants during the test. When the device detected that the vehicle was no longer under testing conditions, it deactivated the emission controls, resulting in significantly increased emissions during normal operating conditions.

[6] Shortly after the notices of violation, civil proceedings were also launched in the United States by the federal government and many state governments. Class action proceedings also began in Canada, including the present proceeding. It was commenced in January 2017, seeking to represent a national class that excludes Quebec purchasers. The appellants, the proposed representative plaintiffs, seek to represent owners and lessees of the Dodge Ram 1500 and Grand Jeep Cherokee with diesel engines for the model years 2014 to 2016. The pleadings include allegations of negligent misrepresentation, false and misleading representations contrary to the *Competition Act*, R.S.C. 1985, c. C-34, unfair and unconscionable practices contrary to consumer protection legislation and civil conspiracy. The allegations against Bosch do not include any wrongdoing under consumer protection legislation.

[7] The appellants have added the respondent Scarsview Motors Ltd. as a defendant because it sold one of the impugned vehicles to one of the plaintiffs. They also seek to name Scarsview as a representative defendant for a defendant class of dealers.

[8] In early 2019, FCA US reached a settlement with the EPA and CARB, as well as U.S. states and class action plaintiffs. Without admitting liability, FCA US agreed to recall the vehicles and repair the device by installing reflashing software known as the Approved Emission Modification ("AEM"). FCA US also agreed to pay an amount of money to U.S. owners and lessees if they obtained the AEM, and it provided an extended warranty on the emissions system.

[9] The EPA and CARB tested and monitored vehicles with the AEM over the course of several months. They were satisfied that the emission control systems complied with regulatory requirements, and there were no adverse effects on average fuel consumption or overall vehicle performance. In his reasons, the motions judge observed,

> The plaintiffs' engineering expert concedes that this repair program "eliminates [the] defeat devices" and "extends emissions control to the expected range of real-world driving conditions."

[10] The recall of the vehicles began on May 7, 2019 in the U.S. FCA Canada began a similar recall program on May 9, 2019.

[11] A further modification to the AEM was made starting in April 2020, said to be aimed at resolving a slight engine hesitation or lag in acceleration.

The Certification Decision

[12] A certification motion was heard over two days in February 2020 and a third day in September 2020. The motions judge made it clear to the parties that he believed there was a threshold issue that must be determined – that is, there must be some evidence that at least one of the plaintiffs suffered compensable harm despite the repair to the emissions system (Reasons, para. 11). By the time of the decision, over two thirds of the affected vehicles had been repaired in Canada.

[13] The appellants claimed that they had suffered loss because they had paid a premium price for an eco-diesel engine, and they received instead a dirty diesel engine. They also argued that the repair of the diesel engine, the AEM, resulted in reduced fuel economy or vehicle performance.

[14] The motions judge considered the evidence proffered and found that there was no evidence that the appellants had suffered a compensable loss of either type. He then turned to the criteria for certification found in s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*"). He did not examine each of the five criteria in his reasons. Instead, he chose to focus on s. 5(1)(d), the preferable procedure criterion.

[15] Section 5(1)(d) requires a motions judge to determine that "a class proceeding would be the preferable procedure for the resolution of the common issues." Here, the motions judge correctly stated that this provision required him to consider the goals of class proceedings – access to justice, behaviour modification and judicial economy. At paras. 39 to 41 of his reasons, he explained why a class proceeding was not a preferable procedure in this case:

> [39] And here, as I have already noted, absent compensable harm, there are no access to justice concerns, the defeat device has been (or is being) repaired and thus behaviour has been modified; and certifying this action would not advance any viable lawsuit and would only result in a waste of judicial resources.
>
> [40] I note that Justice Strathy relied in part on s. 5(1)(d) and "preferability" to deny certification in *Singer* [*Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para. 206] because there was no evidence that the plaintiff himself "ha[d] a real complaint or ha[d] suffered any damages."
>
> [41] The need to show some evidence of compensable loss is a fundamental prerequisite for the certification of a class proceeding [*Atlantic Lottery Corporation Inc. v. Babstock*, 2020 SCC 19 at para. 68]. Compensable loss claims are certainly possible even when a defective product has been repaired. But the loss claims must be presented with some thought, with the right plaintiffs and, of course, with at least some evidence. It is not enough to point to an American Consent Decree or Settlement Agreement and the payments or other benefits that are being provided in the U.S. and expect, without more, that the same result should automatically follow in Canada.

The Standard of Review

[16] The Divisional Court has jurisdiction to hear this appeal pursuant to s. 30(1) of the *CPA*, as it read prior to the coming into force of s. 35 of Schedule 4 to the *Stronger and Smarter Justice Act, 2020*, S.O. 2020, c. 11 (that is, as the Act read on September 30, 2020).

[17] The standard of review for judicial appeals is set out in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. On questions of law, the standard is correctness. On questions of fact, the standard is palpable and overriding error. On questions of mixed fact and law, the Supreme Court stated there is a spectrum. Where there is an extricable legal principle, the standard of review is correctness. However, with respect to the application of the correct legal principles to the evidence, the standard is palpable and overriding error (at paras. 8, 10 and 36).

[18] Moreover, a motion judge's evaluation of "preferability" under s. 5(1)(d) of the *CPA* involves a significant exercise of discretion, because the judge must weigh and balance a number of factors (*Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (Ont. C.A.) at para. 43, cited with approval in *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at para. 65). Such an exercise of discretion is entitled to "substantial deference", and an appellate court should only intervene if there is an error in principle or a palpable and overriding error of fact.

Issues on Appeal

[19] The appellants argue that the motions judge erred in law in three ways: first, he erred in principle in requiring them to prove their loss at a certification hearing; second, he erred in deciding contested facts and the merits of the claim at the certification stage; and third, the motions judge,

unable to use evidence to determine the s. 5(1)(a) inquiry as to whether it was plain and obvious that the claims would fail, impermissibly proceeded indirectly to do this via the preferable procedure criterion in s. 5(1)(d).

[20] More particularly, the appellants submit that the motions judge erred in law by requiring them to show "compensable harm" at the certification hearing. First, they argue that the question at this stage is not whether the plaintiffs have proved their losses today, but rather whether there are common issues which could result in a remedy if resolved in favour of the class. They submit that other cases have certified without proof of actual harm. For example, they cite *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2013 SCC 57, [2013] 3 S.C.R. 477 for the proposition that it is not necessary to establish actual loss at the certification stage, so long as the plaintiff can demonstrate that there is a methodology to do so. Here, the motions judge is said to have ignored the evidence of their experts that they had a methodology to prove losses with respect to paying a premium for the eco-diesel engine.

[21] Second, the appellants argue that the motions judge's decision requiring proof of compensable harm at the certification stage conflicts with consumer protection legislation. A large portion of their claim relies on the *Consumer Protection Act, 2002,* S.O. 2002, c. 30, Sched. A, which they say provides a court complete flexibility to fashion a remedy in unfair practice cases (see *Ramdath v. George Brown College,* 2015 ONCA 921, 392 D.L.R. (4th) 490, at para. 94). The motions judge failed to consider this governing law and the breadth of available remedies under the *Consumer Protection Act* when determining that there was no "compensable loss." As well, restitution, punitive damages and disgorgement of profits do not require proof of loss, so it was an error to require such proof at the certification stage.

[22] In response, the respondents submit that the motions judge made no error in law. His decision was consistent with the jurisprudence. They argue that the appellants are trying to attack findings of fact, but they have failed to show any palpable and overriding error.

Analysis

The motions judge did not require proof of actual loss nor decide the merits of the case at the certification stage

[23] As I explain below, the motions judge did not require the appellants to prove loss at the certification stage, nor did he enter into an assessment of the merits of the case.

[24] The respondents led evidence that the AEM provided through the recall made the emissions device effective without affecting overall fuel economy and vehicle performance. Given this evidence, the motions judge required the appellants to provide some evidence of compensable loss to the plaintiffs. In other words, he required them to show there was some basis in fact to demonstrate that at least some class members had suffered a compensable loss of the types alleged.

[25] This approach is consistent with the case law respecting certification motions. While no evidence is admissible in determining whether the pleadings disclose a reasonable cause of action

pursuant to s. 5(1)(a), the other paragraphs in s. 5(1) require the plaintiff to show there is some basis in fact for each requirement (*AIC Limited v. Fischer*, 2013 SCC 69 citing *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 at para. 39). Indeed, the first sentence in *AIC Limited* explicitly states,

> In order to have a proposed class action certified, the plaintiff must show that there is some basis in fact to conclude that a class proceeding would be the preferable procedure for resolution of the common issues raised in the action … (at para. 1).

Such an inquiry is not to be an assessment of the merits of the case at the certification stage (at para. 42).

[26] Moreover, there was no error by the motions judge when he stated that a proceeding should not be certified as a class proceeding without evidence of some compensable harm. As he stated at para. 11:

> After all, the goals of the class proceeding are access to justice, behaviour modification and judicial economy. If the defect in the product has indeed been repaired and there is no evidence of compensable harm, then there are no access to justice concerns, behaviour modification has been achieved, and proceeding any further in court would be a waste of judicial resources.

[27] This is consistent with the majority's statement in *Atlantic Lottery*, above, at para. 68:

> As I have explained, punitive damages and disgorgement are unavailable to the plaintiffs. Without those remedies, the plaintiffs would be pursuing a breach of contract action wherein each plaintiff effectively elects to pursue nominal damages in lieu of the actual damages they have suffered. Such an action would not further the principal goals of class actions, namely judicial economy, behavior modification, and access to justice (*Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at paras. 27-28).

[28] The appellants argue that the decision of the motions judge is contrary to *Pro-Sys Consultants Ltd.*, above, because he required them to prove actual loss. I disagree.

[29] *Pro-Sys* was an indirect purchaser action. In the sections of the reasons the appellants relied on, the Supreme Court of Canada was discussing whether there was a basis in fact to show that loss-related issues were capable of resolution on a common basis (at para. 114). The Court was not focused on the issue in this case – namely, whether there was some basis in fact for finding that any compensable loss at all had been suffered by the plaintiffs. The Court observed that the plaintiffs were not required to prove actual loss by indirect purchasers (at paras. 115 and 119). Rather, they must show that there was a methodology capable of establishing that overcharges had been passed on to the indirect purchasers so as to satisfy the common issues criterion (at para. 115). The Court accepted that there was evidence of a methodology to show how that loss could be determined.

[30] The appellants point to the Court's statement that the plaintiff is not required to prove actual harm at this stage, saying that the motions judge erred in the present case by requiring proof of actual harm. However, the motions judge's approach is consistent with *Pro-Sys*. He was not requiring quantification of damages suffered in the present case, which is a case involving direct purchasers, not indirect purchasers. Rather, he found there was no evidence that there were any compensable damages suffered by any members of the class once the AEM repair was made.

The motions judge did not err in focusing on s. 5(1)(d)

[31] The appellants also argue that the motions judge erred because he did not consider all the elements of s. 5(1), focusing only on s. 5(1)(d). They also suggest that he imposed a new threshold requirement that the plaintiff must prove compensable loss at certification.

[32] I disagree. The threshold issue was not a new requirement in addition to the criteria in s. 5(1) of the *CPA*. Rather, as the motions judge observed, the absence of evidence of any compensable loss was relevant to the application of s. 5(1)(b), identifiable class; (d), preferability; and (e), suitable representative plaintiff. The FCA respondents also argue that it is relevant to the common issues requirement in s. 5(1)(c).

[33] The motions judge decided to focus only on s. 5(1)(d) in determining the certification motion. That was not an error in principle. To obtain certification, the plaintiff must meet all the requirements in s. 5(1). Failure to meet any of the requirements is fatal.

[34] The appellants also suggest that the motions judge "unable to directly use evidence to assess the pleadings on the 'plain and obvious' standard … did so indirectly through the preferable procedure analysis." There is no merit to this argument. The motions judge assumed there were reasonable causes of action, without considering any evidence. He then turned to the preferability issue, where he properly considered whether there was some basis in fact to find the proposed class action was a preferable procedure.

The motions judge did not err in finding there was no evidence of compensable loss

[35] The appellants argue that the motions judge erred in finding that there was no evidence of compensable loss. They also argue that the motions judge failed to consider that some of the relief they seek, such as rescission, disgorgement of profits and punitive damages, is not dependent on a plaintiff's loss, but rather focusses on the defendant's conduct.

[36] The appellants describe this action as a consumer misrepresentation and misleading advertising case. They have made various claims, including negligent misrepresentation, breach of the *Competition Act*, breach of the *Consumer Protection Act*, breach of contract, and unjust enrichment. In their pleadings, they seek rescission, damages, punitive damages, and disgorgement of profits.

[37] With respect to the motions judge's finding that there was no evidence of compensable loss, the appellants are challenging findings of fact. To succeed they must show a palpable and overriding error.

[38] At the motion, the appellants argued that they suffered two types of damages: the payment of a premium price for a clean, eco-diesel engine that they did not receive and/or the allegedly reduced resale value of the vehicle; and alternatively, the loss after the AEM repair because of increased fuel prices and/or reduced performance of the vehicle.

[39] With respect to the premium price issue, the motions judge found that there was no evidence that anyone paid a premium price for the eco-diesel engine. However, even if there had been such evidence, he found that the appellants could not show that there was a difference in value between what they paid and the value of the vehicle when repaired, so as to permit a remedy pursuant to s. 18(2) of the Ontario *Consumer Protection Act*. Finally, he rejected the argument that the appellants' concern was the fact that their vehicles had been polluting the environment for several years. The motions judge observed that

> the plaintiffs can bring a private claim if they can show some evidence that their vehicle's additional pollution pre-repair caused personal injury or property damage – but no such claim has been advanced and no such evidence has been presented (at para. 27).

[40] With respect to damages post-repair, he found that there was no evidence that the repair resulted in increased fuel consumption or lessened vehicle performance. The respondents had put forward evidence of the disclosure statements approved by the EPA and CARB following testing of the affected vehicles after the initial repair and an updated AEM. According to this material, average fuel economy and performance were not expected to change. The motions judge found that the appellants provided no evidence that there were changes to fuel economy or performance after the updated AEM (at para. 33). He was not persuaded by the evidence of the appellants' engineering expert that proposed a methodology to test whether there may have been such changes.

[41] In my view, the appellants have not shown any palpable and overriding error in these findings of fact. While they argue that they have pleaded losses such as the need to rent a vehicle during the repair of their own, there was no evidence of any such loss before the motions judge to that effect.

[42] With respect to their argument that he failed to consider other remedies that did not require proof of loss to the plaintiffs, this is not a reason to interfere with his conclusion on the preferable procedure criterion, as I explain further below.

The motions judge did not err in finding that a class action would not be a preferable procedure

[43] In determining whether a class proceeding is the preferable procedure, the motions judge engages in a comparative exercise, considering whether an alternative procedure provides procedural and substantive access to justice (*AIC Limited*, above, at para. 24).

[44] The motions judge did consider whether rescission would be available under the *Consumer Protection Act*, concluding this would not be an available remedy, given the vehicles were already several years old. I see no error in his conclusion.

[45] While the motions judge did not discuss disgorgement of profits, that remedy is not available under the *Consumer Protection Act.* Nor would disgorgement of profit be available in this case at common law. As the Supreme Court of Canada stated in *Atlantic Lottery*, above, disgorgement of profits is only available for certain causes of action, such as breach of fiduciary duties, and it is not an independent cause of action (at paras. 27, 30). In order to make out a claim for disgorgement, the appellants must first prove an actionable misconduct. Claims in negligent misrepresentation, conspiracy to injure and breach of the *Competition Act* require proof of consequential harm, and the motions judge found there was no evidence of compensable harm after the repair.

[46] With respect to punitive damages under the *Consumer Protection Act*, such relief is not available against the Bosch respondents, as there is no claim against them under that Act.

[47] With respect to the common law causes of action such as negligent misrepresentation and conspiracy, the appellants must prove causation of damage in order to obtain relief (*Atlantic Lottery*, above, at para. 37). Moreover, punitive damages are available in contract only if there has been an independent actionable wrong (at para. 68).

[48] Ultimately, the motions judge determined that the remedy provided by the repair FCA offered was a remedy that provided access to justice for class members. He did so as he had found there was no evidence of any compensable loss remaining after the repair, and nominal damages were not enough to justify certification. He also concluded that the behaviour modification objective was met. Finally, he considered that a class proceeding would not be a wise use of judicial resources in this case. His finding is consistent with the Supreme Court's decision in *Atlantic Lottery.*

[49] His conclusion is also consistent with other cases, such as *Singer*, above, at paras. 206-207; *Richardson v. Samsung Electronics Canada Inc.*, 2018 ONSC 6130 at paras. 77-80; and more recently the Alberta case, *Setoguchi v. Uber B.V.*, 2021 ABQB 18. In *Setoguchi*¸ the motions judge refused certification, having concluded that there was no evidence of a compensable loss. He emphasized the important gatekeeping function of certification and "the need to weed out unmeritorious and *de minimis* claims" (at para. 123).

[50] The appellants, in their factum and oral argument, stressed that the FCA and Bosch respondents had engaged in deceitful conduct and misrepresentation, yet they had not been held accountable for that conduct, as there have been no Canadian regulatory proceedings like those in the United States. However, the purpose of class proceedings is not to punish defendants. Rather, the purpose is to provide access to justice for those who have been harmed by the misconduct of a defendant and to achieve behaviour modification (see *AIC*, above, at para. 32 quoting the *Report of the Attorney General's Advisory Committee on Class Action Reform* (1990)). In this case, the motions judge, after considering the evidence before him, concluded that there was no evidence of

compensable harm because the plaintiffs had been made whole, there had been behaviour modification and a class proceeding would not be a wise use of judicial resources. This decision is deserving of deference.

[51] Finally, the appellants suggest that the motions judge erred in refusing to certify this class proceeding when a number of other class actions arising from defective emission devices have been certified. Again, I disagree. Each case must be determined on the basis of the record before the motions judge. Here, the motions judge made no error in principle or palpable and overriding error of fact when he refused to certify based on the material before him.

Conclusion

[52] Accordingly, the appeal is dismissed.

[53] The parties have agreed on costs. The appellants shall pay costs to the FCA respondents in the amount of $43,750.00; to the Bosch respondents in the amount of $13,125.00; and to the respondent Scarsview Motors in the amount of $13,125.00.

Swinton J.

I agree

Sachs J.

I agree

Lococo J.

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REASONS FOR JUDGMENT

Swinton J.

Date of Release: May 31, 2021