CITATION: Nordik Windows v. Aviva, 2021 ONSC 5807
COURT FILES NO.: CV-20-643386-CP
DATE: 20210910

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

NORDIK WINDOWS INC.

Plaintiff

and

AVIVA INSURANCE COMPANY OF CANADA, AVIVA GENERAL INSURANCE COMPANY and AVIVA CANADA INC.

Defendants

Proceedings under the *Class Proceedings Act, 1992*

BEFORE: Justice Edward Belobaba

COUNSEL: *Crawford G. Smith, Rahool P. Agarwal, Matthew R. Law, Cole A. Pizzo, L. Craig Brown, Robert Ben, Stephen Birman, Ava N. Williams, Chris T. Blom and Mark Frederick* for the Plaintiff

Alan L. W. D'Silva , Glenn Zacher, Daniel S. Murdoch and *Lesley Mercer* for the Defendants

HEARD: August 26 and September 2, 2021 via Zoom video

Certification Motion – Addendum - Representative Plaintiffs

[1] In the decision released on July 15, 2021, I certified this proposed class action "conditionally" and noted that it would be "fully certified" once the dispute about the representative plaintiff was determined.[1] I had no doubt about full certification because if the

[1] *Nordik Windows v. Aviva,* 2021 ONSC 4477, at para. 53.

current plaintiff, Nordik Windows, was found not to be a suitable representative plaintiff under s. 5(1)(e) of the *Class Proceedings Act,*[2] three other proposed co-plaintiffs were being advanced in any event.

[2] The plaintiff's motion to add the three additional representatives during the course of this certification hearing fully comports with the letter and spirit of ss. 5(4) and 12 of the CPA. It also accords with long-established caselaw that "certification is a fluid, flexible procedural process".[3] I was frankly surprised by defence counsel's resistance to these elementary propositions.[4]

[3] In any event, as I noted in the July 15 certification decision, my reasons for the certification of the appropriate representative plaintiff or plaintiffs would be set out in an Addendum.[5]

[4] This is the Addendum.

[5] For the reasons that follow, this class action is now fully certified as a class proceeding, with *four* suitable representative plaintiffs.

[6] I begin the discussion by considering the suitability of Nordik Windows, the representative plaintiff as proposed initially.

Nordik Windows Inc is a suitable representative plaintiff

[7] Generally, under s. 5(1)(e) of the CPA, the court must be satisfied that there is a representative plaintiff who (i) would fairly and adequately represent the interests of the class, (ii) has produced a workable litigation plan and (iii) does not have a conflict of interest with any of the other class members.

[8] Here, the defendant challenged Nordik Windows' suitability as a representative plaintiff at a more basic level — that the business of Nordik Windows had not been interrupted by any COVID-19-related orders of a civil authority and thus it had no viable insurance claim and was not a suitable class representative.[6] The applicable law in Ontario, sometimes referred to as 'the

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[2] *Class Proceedings Act, 1992,* S.O. 1992, c. 6.

[3] *Williams v. Canon Canada Inc.,* 2011 ONSC 6571, per Strathy J, at para. 12

[4] Some of this resistance may have been fueled by the defendant's reluctance to accept this court's direction that the its motion for summary judgment (advancing, among other things, certain limitation arguments) could not and would not be injected into the middle of this certification motion. However, as I made clear in several communications with counsel, I was willing to hear and consider any of the so-called "summary judgment" arguments provided they were "strictly limited" to the s. 5(1)(e)/suitable representative plaintiff issue.

[5] *Supra,* note 1, at para. 53.

[6] *Ibid.,* at para. 25

rule in *Ragoonanan*,'[7] requires that the representative plaintiff have a cause of action against the defendant.[8]

[9] It is sufficient if the proposed representative plaintiff has even one viable cause of action.[9] I will therefore focus on the plaintiff's Restricted Access or RA claim. Recall that RA coverage is available where the insured sustains a loss of business income "caused by the interruption of the 'business' at the 'premises' when ingress to or egress from the 'premises' is restricted in whole or in part …by order of civil authority resulting from … an outbreak of a contagious or infectious disease that is required by law to be reported to government authorities."

[10] The defendant says there is no evidence that the business interruption at Nordik Windows can be connected in any way to "an order of civil authority resulting from …an outbreak of a contagious or infectious disease that is required by law to be reported to government authorities."

[11] As I made clear in the certification decision, the judicial interpretation of the several key words and phrases that will decide coverage, such as "outbreak" or "required by law to be reported to government authorities" was best left to the merits phase and to the determination of the certified common issues. Here, the defendant sensibly focused on the word "order" and argued that there is no factual evidence that any business interruption was caused by an "order of civil authority".

[12] I do not agree. In my view there is at least some evidence that some part of the business interruption losses sustained by the plaintiff were caused by an "order of civil authority".

[13] This evidence is found in several affidavits (in particular those of Messrs. Noel and Mitton), cross-examination transcripts and in one case via an answer to an undertaking.[10] The evidence is that it was on the advice and recommendation of local public health authorities that Nordik Windows decided to shut down for about six weeks in April and May, 2020 to reconfigure the equipment and work-stations in its manufacturing facility and achieve the recommended six-foot physical distancing. There is evidence that otherwise the plaintiff's employees "were basically on top of each other" in some areas of the manufacturing facility.

[14] There is evidence that the reconfiguration was a significant undertaking: equipment had to be unbolted from the floor to be moved; heavy rollers and forklifts had to be used to physically move equipment which then had to be secured to the floor at new locations; and

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[7] *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.,* [2000] O.J. No. 4597 (S.C.J.).

[8] *Ibid.,* at para. 50; *Hughes v. Sunbeam Corp. (Canada) Ltd.,* [2002] O.J. No. 3457 (C.A.) at para. 18.

[9] *Sankar v. Bell Mobility*, 2013 ONSC 5916, at para 100 and cases cited therein.

[10] The admissibility of the evidence set out in an answer to an undertaking generated a prolonged skirmish that abated only when the plaintiff provided supporting caselaw authority directly on point.

electrical wiring, air lines and vacuum systems had to be disconnected, moved to new locations and then reconnected to the equipment. Four employees spent about a month and a half on the reconfiguration. By May 19, 2020, the reconfiguration was complete, the plaintiff had secured masks for its workers and manufacturing operations resumed.

[15] The defendant demurs and argues that the advice or recommendations of a public health authority is not "an order of civil authority." As already noted, the definitive meaning of "an order of civil authority" will be determined at the merits phase of this litigation when the certified common issues are decided. Here, at certification, it is enough if the plaintiff can establish an arguable basis for the interpretation that is being advanced. In my view, it has done so.

[16] It must first be noted that the defendant agreed when it consented to the certification of the RA common issue that "for the purposes of the common issues", the word "orders" would mean: "all federal, provincial, territorial, municipal, public health official, and regulatory orders or directives across Canada, *as well as all public health advice or guidance issued by any of those entities or any other entities across Canada, that relate to COVID-19*."[11]

[17] In any event, the legal backdrop itself provides some basis for the plaintiff's submission that all businesses were subject to the advice and recommendations of public health officials, including their recommendations about the importance of physical distancing.

[18] Recall the provincial government's initial response to the growing pandemic. Recall as well that the government's response differentiated between "essential" businesses (manufacturing operations such as Nordik Windows) and "non-essential" businesses (which included most retail outlets).

[19] On March 17, 2020, the Ontario government declared a state of emergency under the *Emergency Management and Civil Protection Act*[12] noting that "the outbreak of a communicable disease, namely COVID-19 coronavirus disease, constitutes a danger of major proportions that could result in serious harm to persons."[13]

[20] Six days later, on March 23, 2020, the provincial government issued an order under the EMCPA closing non-essential businesses. The opening words of this closure order also addressed essential businesses:

> And Whereas the temporary closure of places of non-essential business is necessary to help protect the health and safety of the people of Ontario in response to the declared emergency;

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[11] See the certified common issues and included notes: *supra,* note 1, Appendix.

[12] *Emergency Management and Civil Protection Act* R.S.O. 1990, chapter E.9.

[13] O. Reg. 50/20 *Declaration of Emergency*.

> And Whereas the supply chain with respect to *essential* goods, services and resources should continue to function to the full extent possible, *subject to the advice and recommendations of public health officials, including their recommendations about the importance of physical distancing.*[14]

[21] It is thus at least arguable that even essential businesses such as Nordik Windows were still required to consider the advice and recommendations of public health officials, including their recommendations about the importance of physical distancing. This general obligation was affirmed in *Fairstone Financial,*[15] a recent decision of this court:

> Although Fairstone had been categorized as an essential business and was therefore permitted to keep branches open, it was nevertheless required to operate in accordance with the recommendations and instructions of public health authorities. That included controlling access to premises so as to maintain social distancing.[16]

[22] I am therefore satisfied that there is at least *some* evidence that some portion of the business interruption losses sustained by Nordik Windows were caused by an "order of civil authority" namely the advice and recommendations of local public health authorities about the importance of physical distancing.

[23] Counsel for the plaintiff also advanced several other arguments, including one that was based on the *Occupational Health and Safety Act*[17]. There is no need to consider these additional submissions because in my view the "some basis in fact" requirement is sufficiently satisfied by the evidence discussed above.

[24] I am also satisfied that Nordik Windows would fairly and adequately represent the interests of the class, has produced a workable litigation plan and does not have a conflict of interest with any of the other class members.

[25] Nordik Windows is certified as a suitable representative plaintiff.

As are the three proposed additional co-plaintiffs

[26] The three proposed additions — Hangar9 Studios Inc., Cash and Carry Inc. and Real Food for Real Kids Inc. — are also certified as suitable representative plaintiffs.

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[14] O. Reg. 82/20 - Order Under Subsection 7.0.2 (4) - *Closure of Places of Non-Essential Businesses* (Emphasis added.)

[15] *Fairstone Financial Holdings Inc. v. Duo Bank of Canada*, 2020 ONSC 7397.

[16] *Ibid.,* at para. 226.

[17] R.S.O. 1990, c. O.1.

[27] I will discuss each of them in turn.

(i) Hangar9 Studios Inc.

[28] Hangar9 operates a retail store selling women's clothing, shoes and accessories in First Canadian Place in Toronto. It is insured by Aviva under a policy that includes Restricted Access ("RA"), Negative Publicity ("NP") and Physical Damage coverage.

[29] There is some evidence for the following:

- As a retail store, Hangar9 was required to close its premises to in-person shopping because of the March 23, 2020 Closure Order. That Order was made as a result of "the outbreak of a communicable disease namely COVID-19". Hangar9's representative, Denise MacDonald, was not cross-examined on these facts giving rise to her company's claim;
- Hangar9 also advances RA claims for the closure orders on November 20, 2020 and April 8, 2021. There is some evidence that each of these orders were made as a result of one or more outbreaks of COVID-19 and required Hangar9 to close its premises to in-person shopping;
- There is evidence that Hangar9 has suffered well over $100,000 in business losses as a result of the various closure orders.

[30] Hangar9's claim for the business interruption losses was denied on June 16, 2020. On July 16, 2020, Hangar9 commenced an action against Aviva for coverage under its policy but then decided to pursue the claim as part of this proposed class action.

[31] I have no difficulty concluding that Hangar9 has a viable cause of action against the defendant and otherwise satisfies the requirements set out in s. 5(1)(e) of the CPA.

(ii) Cash and Carry Inc.

[32] Cash and Carry is a retail outlet that sells and installs the custom windows manufactured by Nordik Windows and is a Nordik Windows' affiliate. The retail facility operates out of business premises shared with Nordik Windows in the Ottawa area. Cash and Carry is a named insured under Nordik Windows' insurance policy and has the same RA, NP and Physical Damage coverage.

[33] There is evidence in the record of the following. In March 2020, there were increasing reports of cases and outbreaks of COVID-19 in the Ottawa area. Public health authorities recommended physical distancing and working from home as a means to limit or prevent the spread of the virus. There is also evidence that a 25 km radius around Cash and Carry's premises encompasses portions of the City of Ottawa, including Maplewood Retirement Community, as well as portions of the County of Prescott-Russell. There is evidence that outbreaks of COVID-19 were reported in each of these areas.

[34] There is evidence that Cash and Carry sustained significant decreases in retail calls and increases in installation cancellations following the spread of COVID-19 in the Ottawa area in early March of 2020. This had an immediate and negative impact on their revenues.

[35] Cash and Carry advances both RA and NP claims:

- Cash and Carry has an arguable RA claim as of March 23, 2020, in respect of its retail sales operations. There is evidence that under the March 23 closure order, Cash and Carry was not permitted to engage in any retail sales activity and its sales employees were therefore prohibited from accessing its premises;
- Cash and Carry also has an arguable RA claim at least as of April 4, 2020, when the provincial government amended the closure order to restrict the scope of the exclusion for residential renovations to projects where work had already commenced prior to April 4.[18] There is evidence that Cash and Carry conducts same-day installations and was therefore immediately prohibited from continuing its business. As of that date, Cash and Carry's employees were prohibited from accessing its premises for any reason;
- Cash and Carry also has an arguable NP claim. There is evidence that as a result of the significant increase in COVID-19 cases in the Ottawa area and the widespread reporting of outbreaks, many of its customers cancelled their window installations. These cancellations were arguably the direct result of outbreaks of COVID-19 within 25 km of Cash and Carry's premises. (I deal further with the "direct result" issue in my discussion below of the suitability of Real Food for Real Kids as a representative plaintiff.)

[36] In short, there is some evidence that the March 23 order, the April 4 order, and/or the outbreaks of COVID-19 in the Ottawa area resulted in customers cancelling installations and Cash and Carry sustaining losses in business income.

[37] On or about May 15, 2020, Cash and Carry, together with Nordik Windows, gave notice of a claim to Aviva for loss of business income as a result of COVID-19. On June 1, 2020, Aviva denied coverage. On March 2, 2021, Cash and Carry, together with Nordik, submitted a proof of loss to Aviva. Aviva did not respond.

[38] I have no difficulty concluding that Cash and Carry has a viable cause of action against the defendant and otherwise satisfies the requirements set out in s. 5(1)(e) of the CPA.

(iii) Real Food for Real Kids Inc.

[39] It is interesting to note that the defendant said little to nothing about the suitability of Hangar9 or Cash and Carry as representative plaintiffs. Instead, it directed its energy and the court's attention to the third proposed addition.

[40] Real Food for Real Kids or "RFRK" is a catering business providing healthy meals to children in day-care centres and summer camps across the Greater Toronto Area.

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[18] *Supra,* note 14.

[41] There is evidence in the record of the following. Over the course of the first two weeks of March, there was a significant increase in the number of reported daily cases of COVID-19 in Toronto. A 25 km radius around RFRK's business premises encompasses the entire City of Toronto.

[42] On March 17, 2020, as a result of "the outbreak of a communicable disease namely COVID-19", the provincial government ordered all licensed day-care centres to close immediately. As a result, RFRK's customers stopped purchasing meals. RFRK lost all its revenue almost overnight and was forced to lay off more than 90 of its 115 employees.

[43] RFRK submitted an insurance claim for the COVID-related business interruption losses on March 24, 2020. On May 22, 2020, the defendant denied the claim. On July 7, 2020, RFRK commenced a proposed class action but then, like Hangar9, it decided to pursue its claim for coverage as part of this class action. RFRK's proposed class action was stayed as part of the carriage decision and order

[44] RFRK advances an NP claim. Recall that the NP coverage provision insures the loss of business income sustained by the insured "as a direct result of any of the following occurrences … an outbreak of a contagious or infectious disease within 25 kilometres of the 'premises' that is required by law to be reported to government authorities."

[45] The defendant makes two arguments: there is no evidence of any "outbreak", and "no basis in fact… that the March 17, 2020 order directly resulted from any outbreak". Here again, it is important to remember that the interpretation of the coverage language such as the meaning of "outbreak" or "direct result" will be determined when the merits of the certified common issues containing these words and phrases are decided.[19] The plaintiff's hurdle at certification is simply to show a viable or arguable cause of action and some basis in fact for its allegations.

[46] ***Outbreak.*** Dealing first with the "outbreak" issue, RFRK, and the class as a whole, argues that "outbreak" under the policy could mean any or all of (i) a province-wide outbreak; (ii) a city-wide outbreak; (iii) multiple cases with an epidemiological link; or (iv) even a single case of COVID-19. Although the official reporting of "outbreaks" by public health authorities is helpful, says the plaintiff, the class is not limited to those reports and the correct meaning of the word "outbreak" should not be decided on this procedural motion.

[47] In any event, continues the plaintiff, according to Public Health Ontario, the first two weeks of March 2020 saw Toronto case counts increase from four cases per day to 66 cases per day, for a total of 367 cases over the two-week period. The court can infer as a matter of common sense, says the plaintiff, that this increase included at least one "outbreak" or that the dramatic increases collectively could be described as an "outbreak". Also, the provincial government's March 17, 2020 declaration of emergency was stated to be in response to "the

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[19] *Supra*, note 1, Appendix.

outbreak of a communicable disease namely COVID-19" and the related closure order was made pursuant to this declaration. (Emphasis added.)

[48] I agree with the plaintiff. I am satisfied that RFRK has provided some evidence of an "outbreak" of COVID-19 within the arguably relevant area and time period.

[49] ***Direct result.*** The defendant submits that even so, RFRK's loss in business income was not the "direct result" of a COVID-19 outbreak but of the fact that its day-care customer base stopped making purchases. At most, says the defendant, RFRK's business losses were the *indirect* result of COVID-19 and the government closure orders.

[50] As already noted, the interpretation and meaning of "direct result" on the facts herein will be determined when the certified common issues are decided on the merits. However, for the purpose of this certification motion, I am satisfied that RFRK's loss of business income arguably falls within the NP coverage provision — that this business interruption loss was arguably the direct result of the outbreak of COVID-19.

[51] I say this because under the existing caselaw "direct result" is akin to "proximate cause", and "proximate cause" is best understood as an effective or dominant cause that may be found to exist even where there is some intervening step or some passage of time between cause and consequence.

[52] In short, I agree with the plaintiff's and RFRK's summary of the applicable caselaw:

- Causation in insurance law is determined using the proximate cause doctrine. Proximate cause is defined as the "effective or dominant cause of the occurrence" or "what is in substance the cause";[20]

- Proximate cause does not require the cause to be the "closest in time" to the loss. An originating cause can be "proximate" if "in substance" it caused the loss or was the "effective" cause of the loss;[21] and

- The word "direct" in an insurance policy does not displace the proximate cause doctrine. "'Proximate cause' has been treated as synonymous with 'direct cause'" and the "word direct, in qualifying 'result,' does not imply that there can be no step between the cause and the consequence".[22]

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[20] *Co-operative Fire & Gas Co. v. Saindon*, [1976] 1 SCR 735 at 747-748.

[21] *942325 Ontario Inc. v. Commonwealth Insurance Co.* (2005) 75 O.R. (3d) 653 (S.C.J.) at para 19.

[22] *Sher-Bett Construction (Manitoba) Inc v. The Co-operators General Insurance Company*, 2021 MBCA 10 at paras 45-54; *Filkow v. Gore Mutual Insurance Co. et al.* (1965), 55 D.L.R. (2d) 258 (Man. C.A.) at para 4 ; See also: *Ford Motor Company of Canada Ltd. v. Prudential Assurance Co. Ltd. et al.* (1958) 14 D.L.R. (2d) 7, (C.A.) at para 17.

[53] In other words, on the evidence herein, it is at least arguable that the direct or proximate cause of RFRK's business losses was the outbreak of COVID-19 which effectively and sequentially resulted in the government closure orders, the shut-down of RFRK's customer base and the stoppage in customer purchases. In my view, there is at least some basis for the submission that the COVID-19 outbreak or outbreaks were the "proximate" and "effective" cause of RFRK's business losses.[23]

[54] I therefore conclude, as I did with Hangar9 and Cash and Carry, that RFRK also has a viable cause of action against the defendant and otherwise satisfies the requirements set out in s. 5(1)(e) of the CPA.

[55] Each of the proposed additional plaintiffs understands the responsibilities of a representative plaintiff and are prepared to fulfil those responsibilities — they have reviewed and agree with Nordik Windows' litigation plan; they are familiar with the common issues approved by the court; none of them has any conflict of interest with any member of the class on the certified common issues or otherwise; and all of them have already played an active role in this litigation by swearing affidavits, being cross-examined, working with counsel to deliver answers to undertakings and attending court.

Disposition

[56] Nordik Windows Inc., Hangar9 Studios Inc., Cash and Carry Inc. and Real Food for Real Kids Inc. are all certified as suitable representative plaintiffs.[24]

[57] This proposed class action is now fully certified.

[58] A word about costs. The successful plaintiff is of course *prima facie* entitled to its reasonable costs on a partial indemnity basis. And the costs may be significant.

[59] Unlike the parallel *Workman Optometry* class action[25] where certification was achieved on consent, the certification of this action was resisted at almost every step by the defendant

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[23] The defendant's reliance on *Marvelous Mario's Inc., et al. v. St. Paul Fire and Marine Insurance Co.,* 2018 ONSC 1365, aff'd 2019 ONCA 635, is in my view misplaced. The decision does not dislodge the established caselaw or the importance of the proximate cause doctrine as just summarized. The decision is simply an illustration of a fact situation that persuaded the trial judge to deny coverage by drawing a distinction between direct and indirect losses. The court's analysis of "direct result" was motivated in part, and perhaps in large part, by a concern about "double recovery" which does not arise on the facts herein: see the trial decision 2018 ONSC 1365 at para. 33(f) and the appeal decision 2019 ONCA 635 at paras. 18-20.

[24] The style of cause should be amended to include the three newly added representative plaintiffs. Also, as noted in the certification decision, *supra,* note 1 at para. 5, the proper and sole defendant is Aviva Insurance Company of Canada.

[25] The scope and content of the parallel *Workman Optometry* class action is set out in the carriage decision: *Workman Optometry et al v. Aviva Insurance et al*, 2021 ONSC 142.

insurer as was its right. However, many of the defendant's arguments were directed at the merits and were thus premature and not relevant to certification. As a result, the certification motion was unnecessarily bumpy and protracted — and this may be reflected in the plaintiff's costs submissions.

[60] If the parties are unable to agree on the appropriate cost award, they may forward brief written submissions — the plaintiff within 21 days and the defendant within 21 days thereafter.

Signed: *Justice Edward Belobaba*

Notwithstanding Rule 59.05, this Judgment [Order] is effective and binding from the date it is made and is enforceable without any need for entry and filing. Any party to this Judgment [Order] may submit a formal Judgment [Order] for original signing, entry and filing when the Court returns to regular operations.

Date: September 10, 2021