

SUPERIOR COURT
(Class Actions Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
N°: 500-06-000583-118

DATE : June 19, 2012

PRESIDING : THE HONOURABLE MARK SCHRAGER, J.S.C.

Michael Blackette
Petitioner

vs

Research in Motion Limited
Respondent

TRANSCRIPT OF JUDGMENT DELIVERED ORALLY ON JUNE 15, 2012

JS 1319

[1] Petitioner seeks authorization to bring a class action, on behalf of :

« *All residents in Canada who have a BlackBerry smartphone and who pay for a monthly data plan but were unable to access their e-mail, BlackBerry Messenger service ("BBM"), and/or internet for the period of October 11 to 14, 2011, or any other group to be determined by the Court;*
»

Alternately (or as a subclass)

« All residents in Quebec who have a BlackBerry smartphone and who pay for a monthly data plan but were unable to access their e-mail, BlackBerry Messenger service ("BBM") and/or internet for the period of October 11 to 14, 2011, or any other group to be determined by the Court; »

[2] The position is relatively simple. Blackette paid \$25.00 monthly to his wireless provider, Rogers, for his data connection through a BlackBerry device. He lost one day and a half of use during October 12 and 13, 2011. Respondent ("RIM") issued press releases acknowledging the problem, and as such Rogers will not compensate Blackette. RIM offered certain free applications as a goodwill gesture following the service interruption, but Mr. Blackette is not interested in this. He wants the appropriate proportion of his \$25.00 monthly fee (around \$1.75) refunded. He seeks no compensation for inconvenience or consequential damages.

[3] RIM now seeks permission to adduce evidence by way of an out of Court examination of Mr. Blackette regarding the following :

- 3.1 Paragraphs 19 to 26 of the Motion for Authorization which are the facts alleged in support of Petitioner's individual right of action.
- 3.2 Paragraphs 2 and 3 of the Motion for Authorization alleging RIM'S failure to compensate BlackBerry users.
- 3.3 Paragraphs 42 to 49 of the Motion pertaining to Petitioners' ability to adequately represent members of the group.
- 3.4 "Petitioners knowledge of the subject matter of the class generally".

[4] RIM relates these issues to the authorization criteria in Article 1003 (a) and (b) C.C.P., as follows:

- 4.1 Paragraphs 19 to 26 alleging Petitioner's claim for damages are relevant to Article 1003 (a) and (b) C.C.P., i.e. the similarity of the issues across the group and the lien de droit of Petitioner with RIM.
- 4.2 Regarding paragraphs 2 and 3 of the Motion for Authorization, RIM contends that the proposed examination is necessary to investigate the actual damages and their source and nature, and whether they can be determined on a class basis.
- 4.3 Also regarding paragraphs 2 and 3, as well as 19 to 26 of the Motion, RIM seeks to investigate whether the conclusions sought are justified by the cause of action on a class basis.

- 4.4 Regarding Article 1003 (d) C.C.P., RIM seeks to question Petitioner on whether he is indeed in a position to represent the class as described.

[5] The foregoing is a summary of the grounds set forth in the motion seeking permission to examine.

[6] At the urging of the undersigned during oral argument, counsel for RIM has specified and particularized the justification for an examination. Following is a summary of those grounds which constitute in concrete terms, the reasons for seeking an examination.

- 6.1 Mr. Blackette's contract for data service is with Roger's, not RIM; Rogers collects the \$25.00 monthly charges. Other members of the group presumably have contracted with other data service providers, such as Bell and Telus. Thus, RIM wishes to question Blackette on this aspect of the proposed recourse to investigate how the decision was arrived at to sue RIM only, and whether it is in the interest of the group to so limit the action.
- 6.2 Whether the other communication functions on Blackette's BlackBerry device (such as the telephone) functioned during the impugned period, so that Blackette might have communicated in this fashion instead of by e-mail or BlackBerry messenger.
- 6.3 Since Blackette contracted with Rogers as a consumer, can he adequately represent businesses including corporate customers? Are their interests sufficiently similar? For instance, counsel contends that the purchase contract of a BlackBerry device includes an arbitration clause which is unenforceable as a matter of law vis-à-vis consumers in Québec, but would be enforceable against non-consumer purchasers of the device. Accordingly, non-consumers would have no recourse before the Courts and should be excluded from the class. The undersigned would add to this a query as to whether a business interest which owns a BlackBerry and pays for monthly data for the benefit of an individual is a member of the group. In other words, according to the definition proposed for the group in the proceeding, does such business "have" a BlackBerry, or contrapositively is it appropriate to exclude from the members someone who has and uses a BlackBerry, but doesn't pay for the data service from his own pocket?
- 6.4 What was Mr. Blackette's ability to mitigate the loss of use of data on the BlackBerry for the day and a half? For instance, did he have a laptop with e-mail and internet connection available to him?

- 6.5 Did other members of the group accept RIM's goodwill gesture of free applications, and does this acceptance affect the composition of the group and/or Mr. Blackette's ability to represent it?
- 6.6 What communication, if any, regarding these and other points did Blackette have with potential members of the group ? Is he an active representative seeking to promote the group interest or merely the puppet of the attorneys in an action which would only put \$1.75 in the hands of the individual members ?

LEGAL PRINCIPLES

[7] Much ink has been dedicated to the considerations which the Judge must bring to bear in exercising the discretion to allow evidence at the authorization stage of a class action. Such considerations include of course granting permission to conduct an examination of the Petitioner as is requested here.

[8] Article 1002 C.C.P. provides that the issue is one of judicial discretion. Evidence is the exception, not the rule, as the facts in the Motion for Authorization are taken as true at the authorization stage. The judicial dicta are many. Though the principles appear straightforward, the application case to case is not, as appears from the multitude of decisions.

[9] Amongst the latest judicial expression of binding authority of the principles appears in *Allstate du Canada, Compagnie d'assurances vs. Agostino*, 2012 QCCA 678 where the Court of Appeal speaking through Madam Justice Bich consecrates the articulation of the applicable principles set out by Mr. Justice Clément Gascon of the Superior Court (as he then was), in *Option Consommateur vs. Banque Amex du Canada*, 2006 QCCS 6290. As applicable to the motion before the undersigned, these principles are :

- 9.1 Any proof authorized should be useful to the exercise of applying the criteria for authorization in Article 1003 C.C.P.
- 9.2 Proof pertinent to the merits of the claim should not be authorized at this stage.
- 9.3 The burden to demonstrate that proof is appropriate or useful at this stage is on RIM. It must show with precision the tenor and ends sought by the evidence it wishes to adduce.
- 9.4 Any proof authorized should be limited to precise subjects strictly circumscribed.

- 9.5 A proof which contradicts essential elements and thus rebuts the necessary apparent right to proceed by class action is germane.

DISCUSSION

[10] After consideration of the request to adduce evidence by way of an examination through the eyes of the Court that will ultimately make a decision on whether or not to authorize the class action, the undersigned has decided to grant the Motion in part only. There are issues that I would like clarified before ruling on authorization. With reference to the issues enumerated above, these are my reasons :

- 10.1 Firstly and with regard to the "lien de droit" of Blackette (paragraph 6.1), the undersigned agrees with Blackette's counsel that the basis of the recourse proposed against RIM is extra-contractual. There may be an argument in law to be made at the authorization stage or on the merits, if any, of the action, but an examination on this point at least at this stage of proceedings is not warranted.
- 10.2 Regarding paragraphs 6.2 and 6.4 above on the availability of an alternate means of communication and mitigation, these are not germane at this point for purposes of an examination. The authorization sought is to recover damages by way of reimbursement of the sum paid for data services which were not available. Compensation for inconvenience or consequential damages are not sought. An examination which discloses other means to access the internet or e-mail will not change that. The authorization will stand or fall on this basis.
- 10.3 The ability of Blackette to act as a representative (paragraph 6.3 above) of non-consumer potential members of the group is a point of concern for the Court. The ability to opt out is not per se the answer. The potential loss, "lien de droit" and recourse of non-consumers are potentially very different factually and legally. The existence and enforceability of an arbitration clause will potentially affect the composition of the group. In this regard, I refer you to the judgment of the Quebec Court of Appeal in *Telus Mobilité*, 2012 QCCA 170. Questions regarding this area are relevant in the context of this proposed class action to the application of Article 1003 (a) and (d) C.C.P. The allegations in the Motion for Authorization at paragraphs 42 to 49 are quite general, if not generic, and do not address the foregoing concerns. Even if the standard for the application of Article 1003 (d) is not overly demanding (and in this regard I refer you to *Maltais vs. Hydro*

Québec, 2011 QCCS 441), in the context of this case and particularly the potentially differing interest and situation of consumers and non-consumers, further inquiry is merited.

- 10.4 Similarly, paragraph 6.6 above regarding communication with other members of the group is germane. Was there any consultation with potential non-consumer members of the group? It should also be underlined in the *Allstate* case, Madam Justice Bich approved of an examination on one element only, i.e. communication by the representative with other members of the group.
- 10.5 Lastly, with regard to the acceptance by other potential members of RIM's goodwill gesture (paragraph 6.5 above) of the complimentary applications, it is common ground between the parties that the offer was not an admission of liability by RIM on the one hand, and nor was the acceptance thereof a release (or "quittance") by potential members of the group. Accordingly, the Court sees nothing useful in an examination on these matters to the application of Article 1003 C.C.P.

[11] By way of summary, the Motion to adduce evidence will be granted in part only, so that Mr. Blackette be questioned on his role as group representative, and more particularly on his communication with other potential group members, particularly non-consumers. Also, questions may be posed on whether he is in a position to adequately represent non-consumers and the respective interests in the proposed action of consumers and non-consumers (or commercial) parties. This investigation stems from the allegations at paragraphs 42 to 49 of the Petition.

[12] The Court underlines that the examination forms part of the record pursuant to Article 404 C.C.P.

[13] It will be ordered that the examination be held on or before August 30, 2012 given the vacation period . The duration of the exam will be limited to one hour and a half.

CONCLUSIONS

FOR ALL OF THE ABOVE REASONS THE COURT :

[14] **GRANTS** in part only the Motion of Respondent Research in Motion to Adduce Evidence by Way of an Examination of Petitioner;

[15] **GRANTS** leave to examine the Petitioner on the following subject matters only:

- 15.1 The allegations with respect to the ability of Petitioner to represent the members adequately, and more specifically paragraphs 42 to 49 of the Motion for Authorization;
- 15.2 Communication with group members, particularly non-consumers;
- 15.3 Blackette's ability to represent non-consumers; and
- 15.4 The similarity of claims of potential members of the group who are consumers as opposed to non-consumers, or commercial members.

[16] **ORDERS** that the examination be held on or before August 31, 2012 for a maximum duration of one hour and a half, and that the transcript form part of the record.

THE WHOLE WITHOUT COSTS.

MARK SCHRAGER, j.s.c.

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Date of hearing: June 12, 2012