

COURT OF APPEAL FOR ONTARIO
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REGISTRAR / GREFFIER
COUR D'APPEL DE LONTARIO

Court of Appeal File No.: C70906
Court File No.: CV-16-544545-CP

COURT OF APPEAL FOR ONTARIO

B E T W E E N

BARRY REBUCK

Plaintiff
(Appellant)

and

**FORD MOTOR COMPANY and FORD MOTOR COMPANY OF CANADA,
LIMITED and YONGE-STEELES FORD LINCOLN SALES LIMITED**

Defendants
(Respondents)

Proceeding under the *Class Proceedings Act, 1992*

NOTICE OF APPEAL

THE APPELLANT/PLAINTIFF APPEALS to the Court of Appeal from the judgment of the Honourable Justice Belobaba dated June 15, 2022, made at the Superior Court of Justice, Toronto.

THE APPELLANT ASKS that the judgment dismissing the action be set aside and judgment be granted as follows:

1. Granting the Appellant's motion for summary judgment and answering Common Issues 1, 2 and the first part of 3 in favour of the Appellant;¹

¹ The certified Common Issues were initially numbered 1 through 6 in the Certification Order of Justice Morgan dated December 20, 2018. However, as the Appellant moved for summary judgment on three of the certified Common Issues, Justice Belobaba re-numbered the certified Common Issues and references such in the judgment of June 15, 2022 as Common Issue No. 1 (formerly certified Common Issue No. 4), Common Issue No. 2 (formerly certified Common Issue No. 1), and Common Issue No. 3 (formerly certified Common Issue No. 6).

2. Dismissing the Respondents' cross-motion for summary judgment in respect of Common Issues 1, 2, and the first part of 3;
3. Remitting the second part of Common Issue 3 to a Motions Judge for determination;
4. Alternatively, remitting Common Issues 1, 2, and the first part of 3 to a Motions Judge for reconsideration;
5. Costs of the motion payable to the Appellant;
6. Costs of the appeal payable to the Appellant; and
7. Such further and other order as to this Honourable Court may deem just.

THE GROUNDS OF APPEAL ARE AS FOLLOWS²:

Background

1. This appeal concerns the summary judgment dismissal of a certified class action which claims damages on behalf of the purchasers/lessees of the Respondents' (collectively, "**Ford**") 2013 and 2014 model year class vehicles (the "**Vehicles**"). The plaintiff class alleged that Ford made false or misleading representations which understated the fuel consumption of the Respondents' 2013 and 2014 model year class vehicles. The Appellant advanced statutory causes of action under the *Competition Act*, R.S.C. 1985, c. C-34 (the "*Competition Act*"), the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A (the "*Consumer Protection Act*"),

² Any capitalized terms used in this Notice of Appeal have the same meaning as ascribed in the parties' materials filed with respect to the summary judgment motion.

and the parallel provincial consumer protection legislation (the “**Consumer Protection Legislation**”).

2. By Order of Justice Morgan dated December 20, 2018, the action was certified as a class proceeding with six certified common issues. The Appellant moved for summary judgment on the following three certified common issues:

- (a) Did the Defendants [Respondents] contravene section 52 of the *Competition Act* (which prohibits false or misleading advertising)? (Common Issue 1)
- (b) Did the Defendants [Respondents] contravene sections 14 and 17 of the *Consumer Protection Act* and parallel provisions of provincial consumer protection legislation, by making false, misleading or deceptive representations? (Common Issue 2)
- (c) Are the class members entitled to damages under section 36(1) of the *Competition Act*, section 18(2) of the *Consumer Protection Act* and the parallel provisions of the consumer protection legislation in other provinces and, if so, can the damages payable by the Defendants (Respondents) be determined on an aggregate basis and in what amount? (Common Issue 3)

3. The Respondents cross-motivated for summary judgment and the learned Motions Judge directed the parties to proceed to summary judgment according to an agreed-upon statement of issues entitled “Issues for Determination”.

4. The learned Motions Judge further directed that the summary judgment hearing proceed in two phases, wherein he was to hear argument in phase one only on the liability issues, including the first part of Common Issue 3 (“**Phase 1**”),³ to be followed by a phase two hearing on the second part of Common Issue 3 (“**Phase 2**”).⁴ The parties proceeded with the Phase 1

³ Described in the Issues for Determination as Common Issue 6(i)

⁴ Described in the Issues for Determination as Common Issue 6(ii) and (iii)

hearing, after which the learned motions judge issued his Endorsement which decided only Common Issues 1 and 2, ruling against the plaintiff class and accordingly, Phase 2 did not proceed.

5. In doing so, the learned Motions Judge erred in his analysis of Common Issues 1 and 2, and in failing to fully hear argument on the first part of Common Issue 3 making errors of law and also palpable and overriding errors of fact and mixed fact and law.

The Motions Judge's Errors

6. The learned Motions Judge's errors are summarized herein and expanded upon below.
- (a) The learned Motions Judge erred in law in his interpretation and application of section 52 of the *Competition Act*;
 - (b) The learned Motions Judge erred in law and made palpable and overriding errors holding that the representations made by the Respondents were not false, misleading or deceptive in breach of sections 14 and 17 of the *Consumer Protection Act* (Ontario) and the Consumer Protection Legislation;
 - (c) The learned Motions Judge erred in failing to determine the issues before him on Part 1 of Common Issue 3 relating to entitlement to damages; and
 - (d) The learned Motions Judge committed palpable and overriding errors of fact and of fact and law.

Common Issue 1 (*Competition Act*)

7. The learned Motions Judge erred in law in his interpretation and application of section 52 of the *Competition Act* as follows:

- (a) by failing to hold that the representations made by the Respondents on the EnerGuide labels and in the Promotional Materials were knowingly false or misleading by understating the Vehicles' actual fuel consumption by 15%;

- (b) by failing to consider the expert evidence, the 2008 EPA report and NRCan's conclusion in the 2011 Bulletin and the 2013 and 2014 Fuel Consumption Guides that fuel consumption estimates based on 2-cycle Testing were misleading consumers resulting in the NRCan Program change to 5-Cycle Testing in 2015;
- (c) by holding that there is no duty under s.52 of the *Competition Act* to disclose material facts affecting a representation made, where the failure to disclose results in the representation being false or misleading;
- (d) by failing to consider or give effect to section 52(1.1) of the *Competition Act* which provides, in part that in establishing that subsection 52(1) was contravened, it is not necessary to prove that any person was deceived or misled;
- (e) by failing to apply an objective test to determine whether the representations were false or misleading and failing to hold that the misrepresentations were inherently apparent on an objective basis, contrary to the decision of the certification judge, and by considering subjective evidence and giving weight to the absence of focus group or survey evidence regarding the general impression of the representations under section 52(4) of the *Competition Act*;
- (f) by misconstruing the general impression given by the EnerGuide Labels and the Respondents' advertising and brochures and failing to hold that the general impression was that the estimates predicted the vehicles' actual fuel consumption, subject to reasonable variance; and
- (g) on the grounds set out in paragraph 8, 9 and 11 below.

8. The learned Motions Judge erred in law in his application of the paramountcy doctrine to the interpretation of section 52 of the *Competition Act* and the Guidelines issued pursuant to the subordinate NRCan Program as follows:

- (a) by failing to hold that there was no leeway in s.52 of the *Competition Act* for breaches caused by compliance with subordinate federal regulations or programs;
- (b) by failing to hold that there was no conflict between the statute and the Guidelines because the Guidelines were not mandatory or because the Respondents could have complied with both the statute and Guidelines by attaching a Second Label, despite making that finding in his analysis of Common Issue 2;
- (c) by failing to hold that if there was a conflict between the statute and the subordinate NRCan Program, the statute governs;
- (d) by interpreting the statute to protect the Respondents rather than the Appellant by

incorrectly giving paramountcy to the NRCan Program, rather than giving effect to the Act's purpose and intent which is to protect consumers. The learned Motions Judge mischaracterized his interpretation as constituting "fair play and common sense"; and

- (e) in giving any weight to the Respondents' "belief" that the NRCan Program was mandatory as such a finding was irrelevant to the determination of whether the Respondents were in breach of the statute.

Common Issue 2 (Consumer Protection Legislation)

9. The learned Motions Judge erred in law and made palpable and overriding errors in holding that the representations made by the Respondents were not false, misleading or deceptive in breach of sections 14 and 17 of the *Consumer Protection Act* (Ontario) and the Consumer Protection Legislation as follows:

- (a) by failing to apply the objective test in *Richard v. Time*, 2012 SCC 8 to hold that the representations were false or misleading on their face;
- (b) by holding that the reference to the Fuel Consumption Guide on the EnerGuide Label was relevant and fulfilled the Respondents' obligation of full disclosure such that a Second Label, although permitted, was not required;
- (c) by holding that the direction on the EnerGuide Label to ask for the fuel consumption guide where the false impression would be corrected, was sufficient at law to correct the misrepresentation in the EnerGuide Label;
- (d) by failing to consider that there was no reference to the Fuel Consumption Guide in any of the Respondents' advertising or brochures, all of which contained the same fuel consumption estimates as the EnerGuide Labels;
- (e) by reversing the onus of proof with respect to whether purchasers accessed the Fuel Consumption Guide, when the burden of proof of a disclaimer was on the Respondents; and
- (f) by holding that there was no evidence presented by the Appellant of the degree to which purchasers accessed the Fuel Consumption Guide, when the evidence from the Maritz Survey, conducted for the Respondents, and the expert evidence of Dr. Neil Bendle showed that very few purchasers accessed government websites for information about fuel consumption.

Common Issue 3 (Entitlement to Damages)

10. The learned Motions Judge erred in failing to determine the issues before him on Part 1 of Common Issue 3 relating to entitlement to damages, as follows:

- (a) he failed to determine whether privity of contract is required for a claim by consumers for damages under s.18(2) of the *Consumer Protection Act* (Ontario) against a manufacturer or other person who has made false, misleading or deceptive representations in breach of sections 14 and 17 of that Act;
- (b) he failed to determine the nature of the causation requirement for damages under each of the applicable statutes, whether detrimental reliance is required and if so, whether it should be inferred on a class wide basis;
- (c) he failed to determine the meaning of “consumer” under each of the applicable provincial consumer protection statutes and whether standing as a consumer can be determined on a class wide basis; and
- (d) he failed to determine whether a class wide discoverability period of up to 6 months should be applicable to determining the limitation period for all claims or whether discovery is an individual issue.

Palpable and Overriding Errors of Fact and Mixed Fact and Law

11. The learned Motions Judge committed a palpable and overriding errors of fact and mixed fact and law as follows:

- (a) in concluding that “there was a complete absence of evidence for any of the plaintiff’s key allegations.” In fact, there was substantial evidence in respect of all the material facts;
- (b) in misdirecting himself by applying an incorrect legal test to determine whether the Representations were in breach of the applicable statutes and then finding that there was no evidence to meet this incorrect test. In doing so, he failed to consider relevant evidence which proved the Representations were false and misleading;
- (c) in holding that Ford’s belief that NRCan’s directives and the 2012 Guidelines were mandatory had legal effect, when in fact NRCan’s directives and the 2012 Guidelines were not mandatory;
- (d) in holding that “Both NRCan and the EPA agreed that fuel consumption rating

based on a 2 Cycle Test provided a reliable comparison tool and also that the comparative fuel-efficiency rankings would remain the same whether one used the 2-Cycle or 5-Cycle Test”, when that was not true without considering all of the relevant evidence;

- (e) in holding that “the Defendants’ compliance with federal government guidelines that prescribed the design and content of the EnerGuide Label and the required fuel-consumption test method cannot fairly or reasonably amount to a breach of federal competition law;”
- (f) in holding that the Respondents’ “compliance with federal government guidelines that prescribed the design and content of the EnerGuide Label and the required fuel-consumption test method” constituted compliance with a statute and/or regulatory regime, rather than a government program;
- (g) in holding that there was no evidence that “few if any car buyers bothered to refer to the Fuel Consumption Guide and this was known at Ford” and also “no such evidence was presented by class counsel – possibly because none could be found”. Rather, there was considerable evidence that “few if any car buyers bothered to refer to the Fuel Consumption Guide and this was known at Ford”; and
- (h) in holding that “some drivers were able to achieve the EnerGuide Label ratings with fuel-efficient driving. NRCan’s representation in its 2013 and 2014 FCG that the fuel consumption ratings ‘may be achieved with a properly maintained vehicle driven with fuel efficiency in mind’ is in fact supported by numerous independent studies that were summarized in an expert report filed by the Defendants and as well, by a number of individual-driver affidavits, also filed by the Defendants.”

THE BASIS OF THE APPELLATE COURT’S JURISDICTION IS:

- (a) Section 6(1)(b) and 134 of the *Courts of Justice Act*, R.S.O. 1990, c.43;
- (b) The order being appealed from is a final order of a Judge of the Ontario Superior Court of Justice;
- (c) Leave to appeal is not required;
- (d) Section 30(3) of the *Class Proceedings Act*, S.O. 1992, c. 6; and
- (e) Rule 61 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

July 14, 2022

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**BARRY REBUCK - and - FORD MOTOR COMPANY AND FORD MOTOR COMPANY OF CANADA, LIMITED
AND YONGE-STEELES FORD LINCOLN SALES LIMITED**

Plaintiff (Appellant)

Defendants (Respondents)

Court of Appeal File No. C709f06
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