

Court File No.

ONTARIO
DIVISIONAL COURT, SUPERIOR COURT OF JUSTICE

B E T W E E N:

PETER AUBREY DENNIS and ZUBIN PHIROZE NOBLE

Plaintiffs
(Appellants)

- and -

ONTARIO LOTTERY AND GAMING CORPORATION

Defendant
(Respondent)

Proceeding under the *Class Proceedings Act*, 1992, S.O. 1992, c.6

NOTICE OF APPEAL

THE APPELLANTS APPEAL to the Divisional Court of the Superior Court of Justice from the Judgment of the Honourable Justice M.C. Cullity dated March 15, 2010, made at Toronto, Ontario.

THE APPELLANTS ASK that the Judgment be set aside and a Judgment be granted as follows:

- (a) ordering that this action be certified as a class proceeding pursuant to sections 2 and 5 of the *Class Proceedings Act*, 1992, S.O. 1992, c.6, as amended, (the “CPA”);
- (b) defining the classes to include:
 - (i) as “Class A Members”, the Plaintiff Peter Aubrey Dennis (“Dennis”) and all residents of Ontario or their estates who signed the Self-Exclusion Contract (as defined in paragraph 39 of the Statement of Claim) at any time during the period from December 1, 1999, to February 10, 2005;
 - (ii) as “Class B Members”, the Plaintiff Zubin Phiroze Noble (“Noble”) and all other living parents, grandparents, children, grandchildren, siblings and spouses of the Class A Members entitled to claim damages arising from the fault or neglect of the Defendant Ontario Lottery and Gaming Commission (“OLG”) under section 61 of the *Family Law Act*.
- (c) appointing Dennis and Noble as representative Plaintiffs on behalf of the Class A Members and Class B Members, respectively;
- (d) ordering that the action be certified as a class proceeding on the basis of the common issues set out in Schedule A to this Notice of Appeal and on the basis of a revised Litigation Plan, to be filed;
- (e) that the Notice of Certification to all Class Members shall be given in accordance with the revised Litigation Plan referred to in (d);

- (f) that the Defendant Ontario Lottery and Gaming Corporation (“OLG”) pay the Plaintiffs’ costs of this motion; and
- (g) such further and other relief as counsel may advise and this Honourable Court deem just.

THE GROUNDS OF APPEAL are as follows:

1. The learned Motions Judge erred in principle in his analysis of s.5(1)(a) of the CPA by concluding that exclusionary language in the Self-Exclusion Contract (the “Exclusionary Language”) applied to the alleged conduct:
 - (a) by interpreting the Exclusionary Language without first establishing the nature and extent of the duty or duties owed by OLG and, subsequently, whether the scope of the Exclusionary Language was sufficient to cover a breach or breaches of the duty or duties;
 - (b) using a test of reasonableness rather than the correct “plain and obvious” test;
 - (c) without regard for the limited scope of the Exclusionary Language as expressly pleaded, which the Motions Judge was bound to accept as true unless manifestly incapable of proof;
 - (d) without regard for the rest of the contract and in light of its purpose and consumer and statutory context;

- (e) without regard for the fact that such an interpretation would render a key aspect of that contract (OLG's commitment to use its "best efforts" to effect Self-Exclusion) virtually meaningless;
 - (f) subject only to the Plaintiffs successfully establishing that they should not be enforced pursuant to the second and third branches of the test established by the Supreme Court of Canada in *Tercon Contractors Ltd. v. British Columbia* (the "*Tercon* test"), which was an impermissible decision on the merits;
2. The learned Motions Judge erred in his analysis of s.5(1)(a) of the CPA by concluding that there was nothing unconscionable about the Exclusionary Language subject only to the Plaintiffs proving that OLG knew at all material times that its system for enforcing Self-Exclusion was inadequate and would be ineffective, which was:
- (a) an error in principle, in that it amounted to a decision on the merits;
 - (b) a palpable and overriding error of fact or mixed fact and law that disregarded uncontested evidence establishing a clear inequality in bargaining power on the parts of both the individual Plaintiff, Peter Dennis, and the Class A Members, relative to OLG; and
3. The learned Motions Judge erred in his analysis of s.5(1)(a) of the CPA by concluding that proof of vulnerability on an individual basis was required for the Plaintiffs to succeed in overcoming the legal effect of the Exclusionary Language pursuant to the second and third branches of the *Tercon* test, which was:

- (a) a palpable and overriding error of fact or mixed fact and law that disregarded uncontested evidence establishing the vulnerability of both the individual Plaintiff, Peter Dennis, and the Class A Members, relative to OLG;
 - (b) an error in principle, contrary to the third branch of the *Tercon* test as established by the Supreme Court of Canada;
- 4. The learned Motions Judge erred in his analysis of s.5(1)(b) of the CPA by concluding that the proposed class definition was over-inclusive, which was:
 - (a) an error in principle flowing from errors made in his analysis of s.5(1)(a) of the CPA including, but not limited to, the conclusion that proof of vulnerability on an individual basis was required for the Plaintiffs to succeed in overcoming the legal effect of the Exclusionary Language and necessary under s.5(1)(c) of the CPA to establish proximity as part of the duty of care analysis;
 - (b) an error in principle based upon unpleaded defences to the Plaintiffs' claims for a monetary award, contrary to settled jurisprudence that the requirement that success for one must mean success for all is referable to the resolution of the common issues and not to the question whether each class member will succeed in damages or other remedy;
 - (c) a palpable and overriding error of fact or mixed fact and law that disregarded uncontested evidence that each of the Class A Members signed the Self-Exclusion Contract with its "best efforts" commitment and

was subject to the systemic standard of care, so each was entitled to a determination of the adequacy of enforcement of that standard and entitlement to a remedy based on any systemic wrongful conduct and, if so entitled, whether the entirety of the class was entitled to restitutionary relief and punitive damages(if any);

- (d) an error in principle, as it required the Plaintiffs to adopt a merits-based class definition;
- (e) a palpable and overriding error of fact or mixed fact and law that disregarded uncontested evidence establishing that the individual Plaintiff, Peter Dennis, and a large majority of the Class A Members, were likely pathological / compulsive gamblers;

5. The learned Motions Judge erred in his analysis of s.5(1)(c) of the CPA by concluding that the Plaintiffs had failed to establish some basis in fact that a large majority of Class A Members were pathological/compulsive gamblers at all material times, which was:

- (a) an error in principle, given his ruling that a duty of care could not be established other than on the basis of proof of vulnerability on an individual basis in relation to each of the Class A Members;
- (b) an error in principle, given his ruling that the Plaintiffs could not rely upon statistical evidence;
- (c) an error in principle, in that he engaged in a weighing of competing expert opinion to reach his conclusions;

- (d) a palpable and overriding error of fact or mixed fact and law that disregarded uncontested evidence establishing that the individual Plaintiff, Peter Dennis, and a large majority of the Class A Members were likely pathological / compulsive gamblers;
6. The learned Motions Judge erred in his analysis of s.5(1)(c) of the CPA by concluding that the following issues were not common issues, which were errors in principle flowing from, *inter alia*, his conclusions that proof of vulnerability on an individual basis was required for the Plaintiffs to succeed in overcoming the legal effect of the Exclusionary Language, that the Plaintiffs had failed to establish some basis in fact that a large majority of Class A Members were pathological/compulsive gamblers at all material times, and that a duty of care could not be established other than on the basis of proof of vulnerability on an individual basis in relation to each of the Class A Members:
- (a) Whether the Self-Exclusion forms are binding contracts that required OLG to take reasonable care to deny entry to OLG's facilities to the Class A Members, and to detect and remove any who gained entry;
 - (b) Whether OLG had a duty in tort to take such reasonable care;
 - (c) Whether OLG breached either, or each, of the duties in (a) or (b) or its duty under the *Occupiers' Liability Act*;
 - (d) Whether the Exclusionary Language applied in respect of any breaches of the above duties (in (a), (b) or (c));

- (e) Whether damages sustained by the class members as a consequence of any breaches of the above duties (whether measured by the Plaintiffs' consequential losses or the Defendant's gain) can be determined on an aggregate basis in whole, or in part;
 - (f) Whether OLG can be required to account for gross revenues, or net income, derived from class members as a consequence of any such breaches of duty;
7. The learned Motions Judge erred further in his analysis of s.5(1)(c) of the CPA by:
- (a) in relation to the application of s.24 of the CPA, finding that the law had not yet sufficiently developed on "potential liability", which was an error in principle;
 - (b) concluding that the Canadian Problem Gambler Index test could not be relied upon for the purposes advanced by the Plaintiffs, which was a palpable and overriding error of fact or of mixed fact and law;
8. The learned Motions Judge erred in his analysis of s.5(1)(d) of the CPA by concluding that a class proceeding was not the preferable procedure for determination of the common issues advanced by the Plaintiffs, which was an error in principle and/or a palpable error of mixed fact and law flowing, *inter alia*, from his conclusions under ss.5(1)(a) through 5(1)(c) of the CPA;

9. The learned Motions Judge made a palpable and overriding error of fact or of mixed fact and law central to the determination whether a class proceeding would promote “access to justice” as relevant to s.5(1)(d) of the CPA by failing to conclude that the Defendant had suppressed the critical 2001 Martin Report in at least one individual proceeding and, under cross-examination in the within proceeding, refused to answer whether it had disclosed the Martin Report in any other individual proceeding;
10. The learned Motions Judge erred in his analysis of s.5(1)(e)(ii) of the CPA by concluding that the Plaintiffs had not proposed a workable plan for advancing the proceeding, which was an error in principle and/or a palpable error of mixed fact and law flowing from his conclusions under ss.5(1)(a) through 5(1)(c) of the CPA; and
11. Such further and other grounds as counsel may advise and this Honourable Court permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. Section 30(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c.6, as amended;
2. Such further and other bases as counsel may advise and this Honourable Court permit.

The Appellants request that this appeal be heard at Toronto.

DATE: April 14, 2010

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SCHEDULE A

PLAINTIFFS' PROPOSED LIST OF COMMON ISSUES

1. Whether the Self-Exclusion forms are binding contracts that required OLG to take reasonable care to deny entry to OLG's facilities to the Class A Members, and to detect and remove any who gained entry;
2. Whether OLG had a duty in tort to take such reasonable care;
3. Whether OLG breached either, or each, of the duties in 1. or 2. or its duty under the *Occupiers' Liability Act*;
4. Whether the Exclusionary Language applied in respect of any breaches of the above duties (in 1., 2. or 3.);
5. Whether damages sustained by the class members as a consequence of any breaches of the above duties (whether measured by the Plaintiffs' consequential losses or the Defendant's gain) can be determined on an aggregate basis in whole, or in part;
6. Whether OLG can be required to account for gross revenues, or net income, derived from class members as a consequence of any such breaches of duty;
7. Whether the Class B Members sustained damages pursuant to s. 61 of the *Family Law Act* payable by the OLG owing to any of its breaches referred to in 1., 2., or 3. and, if so, the quantum and how they should be distributed;
8. Whether the class members are entitled to a punitive damages award against the OLG and, if so, the quantum and how they should be distributed;
9. Whether the OLG should pay prejudgment and post-judgment interest on any damages awarded and, if so, in what amounts and how should it be distributed; and
10. Whether the OLG should pay the costs of administering and distributing any monetary judgment and/or the cost of determining eligibility and/or individual issues and if so, in what amount or on what bases?

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