SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-001140-215

DATE: January 28, 2022

BY THE HONOURABLE CHRISTIAN IMMER, J.S.C.

BRUNO SIMARD
Plaintiff
v.
APPLE CANADA INC.
and
APPLE, INC.
Defendants

JUDGMENT

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[1] In order to contest Bruno Simard's *Application for Authorization to Institute a Class Action* ("*Application*"), Apple Canada Inc. and Apple Inc. (collectively "Apple") seek the Court's authorization to adduce five exhibits and to examine Simard (the "Request").

[2] During the hearing, Apple withdrew its request to file exhibit APL-3(b) and Simard[1] agreed to the filing of APL-1. The Court finds that the filing of APL-1 is warranted.

[3] Simard asks the Court to dismiss the balance of the Request.

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1 The Court uses family names to lighten the text. The persons concerned should not see this as a lack of respect or courtesy.

CONTEXT: THE APPLICATION FOR AUTHORIZATION

[4] The class, on whose behalf Simard asks the Court to be appointed as representative, would be constituted of (the "Proposed Class"):

> All persons in Canada who purchased and/or own a MacBook Laptop equipped with a butterfly keyboard", manufactured, distributed, sold, or otherwise put onto the marketplace by the Apple Defendants, including, but not limited, to:
>
> - Early 2015 MacBook;
> - Early 2016 MacBook;
> - 2016 MacBook Pros;
> - 2017 MacBook and MacBook Pros;
> - 2018 MacBook and MacBook Air;
> - 2019 MacBook Pros and MacBook Air.
>
> (collectively referred to as the "**MacBook Laptops**")

[5] Simard alleges a number of facts and files twelve exhibits which can be summarized for the purposes hereof as follows:

5.1. Simard is a Consumer. He purchased a MacBook in 2016.

5.2. Apple warrants and is legally obligated to guarantee that the MacBook Laptops are free from defect in material and workmanship which occur under normal use.

5.3. In Spring 2015, Apple introduced and began selling new Laptops with a "butterfly keyboard".

5.4. The butterfly keyboard is prone to fail, because its design allows minute amounts of dust and debris to accumulate under or around the keys, causing the keys to stick, the keyboard to fail to register properly the keyboard to register three or more times the keystrokes required by the used.

5.5. Plaintiff in particular witnessed these problems and his MacBook keyboard has been replaced twice by Apple.

5.6. Consumer complaints were widely advertised in the media. A sample of such complaints is provided in exhibit R-2, which consists of 11 articles published in various media, including several in the Wall Street Journal.

5.7. A class action was certified in California, regarding allegedly defective Apple butterfly keyboards, as appears from exhibit R-4.

5.8. Apple has stopped using the butterfly keyboard and returned to traditional scissor type keyboards.

5.9. Given the premium clients pay, purchasers are entitled to expect that the MacBook Laptops would last for many years, which they did not.

5.10. Apple put in place a special Keyboard Service Program (the "KSP") in June 2018 which purported to provide free keyboard repairs and replacements, but simply replaced butterfly keyboard with the same defective butterfly keyboards.

5.11. When the keyboards were replaced, clients were not informed that the problem would manifest itself again.

5.12. Plaintiff and Proposed Class members purchased a computer they would never have purchased had they been informed of the keyboard's defect.

[6] Simard therefore makes the legal syllogism that the above facts demonstrate that the MacBook Laptops have a defect and seeks various remedies.

ANALYSIS

1. Legal Principles

[7] As per 574 C.C.P., "the court may allow relevant evidence to be submitted" to contest an application for Authorization. Requests to adduce evidence must be evaluated in the perspective of the ultimate authorization exercise the Court will be called upon to carry out.

[8] In this regard, the Supreme Court in *L'Oratoire Saint-Joseph du Mont-Royal*[2] sets out the principles which clearly delineate how authorizations must be dealt with. The Supreme Court cites the following key extracts:

8.1. "The applicant's burden at the authorization stage is simply to establish an "arguable case" in light of the facts and the applicable law which is a low threshold";

8.2. "The applicant need establish only a mere "possibility" of succeeding on the merits, as *not even* a "realistic" or "reasonable" possibility is required";

8.3. "The legal threshold requirement under art. 575(2) C.C.P. is a simple burden of

2 *L'Oratoire Saint-Joseph du Mont-Royal* v. *J.J.*, 2019 SCC 35, par. 58 [*L'Oratoire*].

"demonstration" that the proposed "legal syllogism" is tenable";

8.4. "It is in principle not appropriate at the authorization stage for the court to make any determination as to the merits in law of the conclusions in light of the facts being alleged. It is enough that the application not be "frivolous" or "clearly wrong" in law, or in other words, the applicant must establish "a good colour of right"";

8.5. "As for the evidentiary threshold requirement under art. 575(2) C.C.P., it is more helpful to define it on the basis of what it is *not*. First, the applicant is *not* required to establish an arguable case in accordance with the civil standard of proof on a balance of probabilities, as the evidentiary threshold for establishing an arguable case falls "comfortably below" that standard. Second, he or she is *not*, unlike an applicant elsewhere in Canada, required to show that the claim has a "sufficient basis in fact"".

[9] Although after the Court of Appeal judgment in *Asselin* was rendered, the Supreme Court heard an appeal thereof, maintained the judgment and provided its own reasons, the Court of Appeal's analysis remains highly relevant as to the narrowness of the corridor which Defendant's request for additional evidence must follow.[3] The undersigned has summarized it as follows in *Salko*:[4]

> Les questions touchant la nature et le volume de la preuve additionnelle qui peuvent être permis par le Tribunal sont inextricablement liées à la fin à laquelle cette preuve additionnelle pourra servir. C'est ce qui amène la Cour d'appel dans *Asselin* à formuler ses mises en garde quant au couloir étroit qu'emprunte une telle demande :
>
> - Cela doit être fait avec modération et être réservé à l'essentiel et l'indispensable;
> - Cela doit établir sans conteste l'invraisemblance ou la fausseté;
> - La preuve ne doit pas servir à examiner sous toutes les coutures les éléments produits par l'un ou l'autre;
> - Il ne doit pas trancher prématurément sur les moyens de défenses de l'intimé;
> - Il doit porter un regard sommaire de cette preuve qui devrait être d'une certaine frugalité. L'analyse ne doit pas être pointilleuse.

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3 *Asselin* c. *Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673, par. 38 à 40.
4 *Salko* c. *Financière Banque Nationale inc.*, 2021 QCCS 4678.

[10] Justice Donald Bisson has recently comprehensively listed the guiding principles of appellate case law dealing with the filing of additional relevant evidence in *Ward*.[5] The Court incorporates them by reference in this judgment.

[11] He cites the Court of Appeal decision in *Durand*, which is particularly relevant to the matter the Court has to decide:[6]

> [51] Cette preuve doit en effet être essentielle, indispensable et limitée à ce qui permet de démontrer sans conteste que les faits allégués sont invraisemblables ou faux. Elle ne doit pas avoir pour effet de forcer la tenue d'un débat contradictoire sur une question de fond ou, dit autrement, entraîner la tenue d'un procès avant le procès.
>
> [52] Si la preuve déposée est susceptible d'être éventuellement contredite par le requérant, le juge de l'autorisation doit faire preuve de prudence et ne pas tenir pour acquis qu'elle est vraie. Il doit se rappeler qu'il ne doit tenir pour avérés que les faits allégués par le requérant et non pas ceux allégués par l'intimé, même lorsque la preuve produite par ce dernier démontre *prima facie* l'existence de ces faits.
>
> [53] À ce stade, le fardeau du requérant en étant un de logique (également qualifié de fardeau de démonstration) et non de preuve, il n'a d'ailleurs pas à offrir une preuve prépondérante de ce qu'il avance, mais bien, tout au plus, une « certaine preuve » et n'a pas l'obligation de contester la preuve que l'intimé dépose, ni d'y répondre. D'ailleurs, il n'est souvent pas en mesure de le faire puisqu'il n'a pas toujours toute la preuve en main, une bonne partie de celle-ci pouvant être en possession de l'intimé.
>
> [54] Bref, la preuve déposée par un intimé au soutien de sa contestation ne change pas le rôle du juge de l'autorisation qui peut, certes, trancher une pure question de droit et interpréter la loi pour déterminer si l'action collective projetée est frivole, mais qui ne peut, pour ce faire, apprécier la preuve comme s'il y avait eu un débat contradictoire ou encore présumer vraie celle déposée par l'intimé alors qu'elle est contestée ou simplement contestable.
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> [The Court's underlinings]

[12] Apple stresses that the Court should not prejudge the merits of its arguments that Plaintiff's claim is untenable and should allow filing, under reserve, of an eventual decision on the probative weight of such evidence. The Court disagrees. With respect, Apple must demonstrate that their request fits within the confines of *Asselin* and *Durand*. If it does not, it is not appropriate for this Court to allow the filing of the additional evidence and postpone its decision to a later date.

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5 *Ward* c. *Procureur général du Canada*, 2021 QCCS 109.
6 *Durand* c. *Subway Franchise Systems of Canada*, 2020 QCCA 1647.

2. The Exhibits

[13] Save for exhibit APL-1, the Court does not consider that the exhibits Apple wishes to file fit within these narrow confines.

[14] APL-2 is an undated extract from Apple's website dealing with a cleaning procedure that can be carried out, with compressed air, when the MacBook or MacBook Pro is "unresponsive". This is not a security instruction or an extract of a user manual. APL-2 does not fit within the narrow confines of the case law cited by Apple.

[15] Nevertheless, Apple offers in its plan of argument the following justification with regard to exhibit APL-2:

> 15. Apple intends to use this evidence, in conjunction with APL-3 (discussed below), to argue at authorization that Plaintiff has not put forward a defendable case with respect to an alleged defect. Like many products and components, especially electronics, keyboards require care, and failure to follow these care instructions cannot equate to a defect in these keyboards.

[16] To understand this argument, it must be noted that APL-3(a) constitutes a "GCRM Repair Worklist" which relates to work carried out on Plaintiff's laptop in January 2021. An unidentified person comments three photos, most likely APL-3(c), indicating: "internal views, lots of nicotine that can explain why keyboard isn't working properly", "wow" and "fans are full".

[17] From this, Apple says exhibit APL-2 is required to show that Simard did not give proper care to his computer, i.e. cleaning it with compressed air. With respect, APL-2 is not an instruction. It is a troubleshooting method to clean a keyboard. On its face, it does not serve the purpose Apple claims it does, e.g. instruct the client how to care for his or her computer. Even if the Court were to accept that APL-2 reached that far, clearly there is debate as to the usefulness of any such method in reviewing certain articles filed in R-2, given the inherent design of the butterfly keyboard. If APL-2 is authorized at this stage to file this document, it will necessarily give rise to a debate on the merits at the authorization stage whether this method is part of duty of proper care and if carrying out such procedure would have changed anything. This is inappropriate at the authorization stage.

[18] As regard APL-3(a) and (c), they are manifestations of an opinion that nicotine "can explain why keyboard isn't working properly". This does not establish "sans conteste l'invraisemblance ou la fausseté" of the fact that the MacBook Laptops have a defect. It is a hypothesis, emitted by an unidentified person, whose truthfulness will have to be established through proper evidence on the merits. Clearly, it is subject to contestation.

[19] Apple also argues that these exhibits will demonstrate that Simard is not in a position to properly represent the class members. In *L'Oratoire,*[7] the Supreme Court has

stated that under art. 575(4), the applicant must show (a) an interest in the suit, (b) competence and (c) an absence of conflict with the class members. It would be inappropriate under the guise of criteria (c), to carry out the exercise which is clearly excluded under 575(2).

[20] Hence, the filing of APL-2 and APL-3(a) and (c) are not authorized.

[21] It is not necessary for this Court to deal with Plaintiff's objection that the filing of these exhibits required an affidavit, and whether it is unreasonable, as per art. 2870 CCQ to require the unidentified author of the comments relating to the three photos in APL-3(a) to file an affidavit, on the basis that the comments were drawn up in Apple's "ordinary course of business" or constitute "spontaneous statements that are contemporaneous to the occurrence of the facts".

3. Examination of Simard

[22] Defendant asks to examine Plaintiff on the following five topics:

(a) His specific keyboard complaints prior to the first and second repairs alleged;

(b) Keyboard care;

(c) Knowledge of alleged defect (ex. underlying cause, possibility of multiple causes);

(d) Knowledge of the actual cause for his first and second repairs, including nicotine buildup;

(e) Knowledge of other class members' experiences.

[23] The Court is not satisfied that these requests are sufficiently focused and precise. They do not seek to elicit precise facts which need to be alleged in the proceedings in order to debate the authorization, for example the exact representations which are made to a potential representative by a defendant. What is sought here is to test Plaintiff's case.

[24] More specifically, regarding point a), paragraphs 26, 27 and 30 provide clear and sufficient detail as to Plaintiff's "complaints" prior to the first repair and second repairs.

[25] Points b) c) and d) cannot be allowed for the same reasons as those provided by the Court to exclude exhibits APL-2 and APL-3(a) and (c). The proposed endeavour is one akin to straightforward cross-examination and discovery.

[26] Finally, Plaintiff sets out in paragraph 74 why he is in a position to properly represent the group. Attempting to delve into Plaintiff's knowledge of other Proposed

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[7] *L'Oratoire*, prec., note 2.

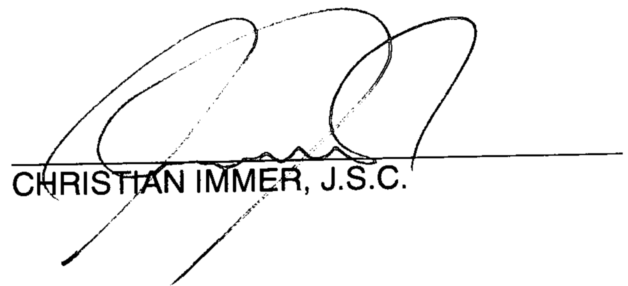
Class members is not appropriate in light of the limits set to such an enquiry in *Lévesque*[8] and *Charles.*[9]

FOR THESE REASONS, THE COURT:

[27] **AUTHORIZES** the filing of exhibit APL-1;

[28] **DISMISSES** the request to file exhibits APL-2 and APL-3(a) and (c) and the request to examine the Plaintiff;

[29] **THE WHOLE WITH COSTS** to follow the outcome of the *Application*.



CHRISTIAN IMMER, J.S.C.

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Hearing date: January 25, 2022

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8 *Lévesque* v. *Vidéotron, s.e.n.c.*, 2015 QCCA 205.
9 *Charles* v. *Boiron Canada inc.*, 2016 QCCA 1716.