SUPERIOR COURT

(Class Action)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000891-172

DATE: September 3 , 2019

PRESIDED BY THE HONOURABLE MICHELINE PERRAULT, J.S.C.

MARYSE NICOLAS
Plaintiff

v.

VIVID SEATS LLC
Defendant

JUDGMENT
(on the Notice of Case Management presented by Plaintiff)

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[1] By its Notice of Case Management, Plaintiff submits that the Court should exclude the possibility for Defendant to file an "*expert report in website design for marketing to consumers*".

[2] Additionally, Plaintiff alleges that it will be impossible to set down for trial and judgment within the 6-month limit provided for in the *Code of Civil Procedure* ("**CCP**") and that an extension is necessary.

[3] Finally, Plaintiff, with the consent of the Defendant, is asking the Court to split the proceeding so that they may proceed first on the issue of fault before dealing with the issue of damages.

1– The expert report

[4] Plaintiff visited Defendant's website and purchased two tickets for a concert by the singer Pink at a price of $929.90. She alleges that she assumed the price was in Canadian dollars since no currency had been mentioned throughout the entire process. Plaintiff realized that the price was in US dollars when she received her bankcard statement. She was billed $1,250.37 in Canadian dollars.

[5] In support of the class action, Plaintiff submits that Defendant violated four provisions of the *Consumer Protection Act* ("**CPA**")[1]. First, section 54.4 of Title 1 of the CPA on distance contracts which reads as follows:

> "54.4. Before a distance contract is entered into, the merchant must disclose the following information to the consumer:
>
> (....)
>
> (h) the currency in which amounts owing under the contract are payable if not Canadian dollars;
>
> (...)
>
> The merchant must present the information prominently and in a comprehensible manner and bring it expressly to the consumer's attention; in the case of a written offer, the merchant must present the information in a manner that ensures that the consumer is able to easily retain it and print it."

[6] Plaintiff also refers to sections 219, 224 and 228 of Title II on business practices:

> **219**. No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.
>
> **224**. No merchant, manufacturer or advertiser may, by any means whatever,
>
> ...
>
> *(c) charge, for goods or services, a higher price than that advertised.*
>
> For the purposes of subparagraph c of the first paragraph, the price advertised must include the total amount the consumer must pay for the goods or services. However, the price advertised need not include the Québec sales tax or the Goods and Services Tax. More emphasis must be put on the price advertised than on the amounts of which the price is made up

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[1] CQLR, c. P-40.1.

> **228**. No merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer.

[7] On September 6, 2018, Justice Benoit Moore authorized the bringing of a class action and appointed Plaintiff the status of representative for the persons included in the following class:

> "Class:
>
> All consumers within the meaning of the Quebec's Consumer Protection Act who purchased a ticket from Vivid Seats web site or application since November 16th, 2014;
>
> Tous les consommateurs au sens de la Loi sur la protection des consommateurs qui ont acheté un billet à partir du site ou de l'application portable de Vivid Seats depuis le 16 novembre 2014:"

[8] Justice Moore also identified the questions of fact and law to be treated collectively as the following:

> " (a) Did Defendant violate s. 54.4*(h) C.P.A.*?
>
> (b) Did Defendant violate ss. 219, 224 and 228 *C.P.A.*?
>
> (c) If there has been a violation of one or more of these provisions, can the members of the class action claim compensatory and punitive damages from Defendant? If so, in what amount? "

[9] Defendant wants to file an expert report regarding website design for marketing to consumers. This expert report will help the Court understand whether the information in question was displayed "prominently and in a comprehensible manner" from the point of view of the consumer. The Defendant has suggested the name of two experts who are both professors of marketing at HEC Montréal specializing, amongst other subjects, in online consumer behavior.

[10] Plaintiff argues that an expert in marketing can't give an opinion on whether "the consumer behavior" is legal or not and thus will shed no light on the decision the Court has to render.

[11] In the case of *Widdrington (Succession de)* c. *Underwriters at Lloyd's*[2], Justice André Prévost had to decide whether an expert report, which had yet to be filed, was admissible. He reviewed the relevant guidelines:

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[2] 2014 QCCS 3051.

" [40] Dans un court arrêt se rapportant à une requête en rejet d'un rapport d'expert, la Cour d'appel réitère que :

> [1] Règle générale, il appartient aux juges du fond de statuer sur la pertinence, l'utilité, la nécessité et la valeur probante de rapports d'expertise (*Burla c. Canadian Pacific Railways*, J.E. 2003-421 (C.A.)).
>
> [2] L'article 4.1 *C.p.c.* énonce que les parties à une instance sont maîtres de leur dossier et, en second lieu, que le tribunal veille au bon déroulement de l'instance et intervient pour en assurer la saine gestion.
>
> [3] Si, comme le prétend l'intimée, le rapport communiqué par l'appelante comporte des énoncés qui risquent d'usurper la fonction de la ou du juge, notamment quant à l'interprétation du contrat entre les parties, il pourra formuler ses objections lorsque l'appelante tentera de produire le rapport.
>
> [4] Dans les cas où un rapport d'expert a été mis hors dossier par jugement interlocutoire, les tribunaux ont agi ainsi parce que le rapport qu'une partie avait communiqué à l'autre comportait une opinion juridique sur la question à trancher et que l'auteur était un avocat, un notaire ou un « jurisconsulte ». Tel n'est pas le cas en l'espèce.

[41] Dans l'arrêt *St-Adolphe d'Howard (municipalité de) c. Chalets St-Adolphe inc.*, la juge Thibault ajoute :

> [12] La règle générale suivant laquelle il appartient au juge du fond de statuer sur la pertinence, l'utilité, la nécessité et la valeur probante d'un rapport d'expertise est bien connue.
>
> [13] Il s'agit d'une règle dictée par la prudence. Elle repose sur le postulat que la décision sera plus avisée si elle est prise par un juge informé.
>
> [14] Cette règle peut cependant être modulée lorsque la question à trancher en est une de droit pour laquelle la connaissance factuelle n'est pas en cause. En effet, dans une perspective de saine administration de la justice, il serait inconséquent de forcer une partie à un litige à produire un rapport d'expertise en réponse à un rapport qui apparaît, à la face même des procédures, étranger aux véritables questions à trancher. Les articles 4.1 et 4.2 C.p.c. permettent au juge, même à une étape préliminaire, de se saisir de la question et, dans les cas clairs, de limiter le débat en écartant au dossier une preuve non pertinente. [références omises]

> [42] La situation est-elle différente dans le cas où, comme ici, un dossier est soumis à une gestion particulière d'instance, ce qui implique que le juge qui dispose des moyens préliminaires est celui qui sera aussi saisi du procès au fond?
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> [43] La juge La Rosa, dans *Aliments Breton (Canada) c. Oracle Corporation Canada inc.*, répond négativement à cette question :
>
> > [37] Toutefois, le Tribunal ajoute que, même si un juge est saisi de la gestion particulière d'un dossier, il y a lieu de maintenir la distinction qui existe entre le degré de preuve requis au stade préliminaire et celui analysé lors de l'audition au fond.
> >
> > [38] Il est vrai que le juge saisi de la gestion particulière peut acquérir au fil du temps une connaissance assez approfondie de l'ensemble du dossier. Dans ce contexte, les procureurs n'ont pas à reprendre, lors de la présentation des différentes requêtes incidentes, tout l'historique du dossier.
> >
> > [39] Toutefois, cela ne peut avoir pour effet de demander au juge chargé de la gestion particulière de statuer prématurément sur le fond du litige sous prétexte qu'il porte deux chapeaux, à moins, évidemment, d'être en présence de cas si clairs que l'intérêt de la justice en soit ainsi préservé.
>
> [44] Le Tribunal partage ce point de vue.
>
> [45] Comme le soussigné l'indique dans *Pellemans c. Lacroix* :
>
> > [20] En somme, un rapport d'expertise ne sera écarté au stade préliminaire que dans des cas exceptionnels, lorsqu'il est manifeste que son contenu usurpe la fonction du juge qui présidera le procès. C'est le cas, notamment, d'un rapport préparé par un juriste comportant une opinion juridique sur le débat à trancher.»
>
> (références omises)

[12] Defendant submits that the Court should decide whether it is appropriate to file the expert report after it has seen the report. The Court agrees.

[13] Firstly, the expert report Defendant proposes to file is not a legal opinion. Secondly, it may or may not shed some light on the questions the Court has to decide. However, the Court finds that it is premature at this time to declare that the expert report is inadmissible In addition, once it has been filed, the expert report can be withdrawn or corrected[3].

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[3] Article 241 CCP.

[14] The Court will therefore allow Defendant to file its expert report and will reserve Plaintiff's right to demand that it be withdrawn or corrected, as the case may be.

2– The extension of delay

[15] The Court agrees with the parties that an extension of the 6-month limit is necessary in the present circumstances.

3– The split of the proceeding

[16] Plaintiff, with the consent of the Defendant, is asking the Court for permission to split the proceeding so that the question of fault can be adjudicated on before and separately from the issue of damages. Plaintiff argues that the question of damages in this case is complex and that the proceeding will be accelerated if the issue of fault is decided before and separately from the issue of damages.

[17] The Court agrees. A judgment dismissing Defendant's liability will render the question of damages totally useless. Conversely, if Defendant's liability is maintained, it could favor a settlement between the parties on the question of damages. In order to ensure the proper management of this case and the respect of the rule of proportionality, the Court believes that splitting the proceeding will accelerate the proceeding, reduce the time set aside for the hearing and ensure that the parties do not have to incur additional costs needlessly.

[18] Thus, the Court finds that it is in the best interest of the class members to split the issue of fault from the issue of damages.

WHEREFORE, THE COURT:

[19] **AUTHORIZES** the Defendant to file an expert report with respect to "website design for marketing to consumers" and **RESERVES** Plaintiff's right to file a cross-expertise or demand that said expert report be withdrawn or corrected, as the case may be;

[20] **EXTENDS** by 6 months the delay for setting the present case for trial, and **ORDERS** the parties to modify the First Case Protocol accordingly;

[21] **SPLITS** the proceeding so that the question of liability, and more specifically the first two common questions at paragraph 65 of the authorization judgment, is decided before and separately from the question of damages;

[22] **THE WHOLE,** with judicial costs to follow.

MICHELINE PERRAULT, J.S.C.

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Hearing date: August 27, 2019