

SUPERIOR COURT (CLASS ACTION)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N : 500-06-000956-181

DATE : October 6th, 2020

PRESIDING : THE HONOURABLE SYLVAIN LUSSIER, J.S.C.

VANESSA GARTNER

Plaintif.

c.

FORD MOTOR COMPANY OF CANADA, LIMITED

FORD MOTORS COMPANY

Defendants

JUDGMENT

THE CONTEXT

[1] The Court is seized with a series of objections to written questions asked in the following context :

[2] Plaintiff is seeking to obtain authorization to institute a class action against Defendants on behalf of :

Sub-Group A :

All residents of Canada (or subsidiarily Quebec), who own, owned, lease and/or leased one or more of the Subject Vehicles, namely :

2013-2014 Ford Escape;

2013-2014 Ford Fusion;

2013 Ford Fiesta;

2014-2015 Ford Transit Connect.

Sub-Group B:

All residents of Canada (or subsidiarily Quebec), who have suffered damages and/or disbursed costs as a result of the defects affecting the Subject Vehicles;

Or any other Group(s) or Sub-Group(s) to be determined by the Court;

(hereinafter referred to as the « Plaintiff(s) », the « Class Member(s) », the « Class », the « Group Member(s) », the « Group »);

[3] According to Plaintiff, the said vehicles were equipped with « defective engines and related parts which are prone to overheating, leak solvent liquid or fuel, stall and in certain circumstances, catch fire »¹.

[4] Defendants sought leave to adduce additional evidence, by way of a sworn declaration of Mr. Gregory West.

[5] This sworn declaration clarified which Ford models were affected by the recalls enumerated in Plaintiff's motion for authorization to institute a class action, and listed additional safety recalls which applied to Plaintiff's vehicle;

[6] The sworn declaration established that the recalls affecting Plaintiff's vehicle entailed repairs that were completed prior to the purchase of the vehicle by Plaintiff².

[7] It also clarified that certain recalls did not concern Plaintiff's vehicle³.

[8] On December 20, 2019, the undersigned granted leave to file the sworn declaration of Gregory West⁴.

[9] Upon Plaintiff's counsel expressing the wish to examine Mr. West on «any other relevant fact » of the case pursuant to article 222 *CCP.*, the Court, exercising its powers pursuant to article 158 (3) *CCP.*, limited the examination to the allegations of the sworn declaration, and ordered it to be conducted in writing.

[10] The objections are adressed to the questions asked. Some issues arise from the answers given.

¹ Paragraph 6 of Amended Application for Authorization to Institute a class action.

² Paragraph 16 of Gregory West's sworn declaration of February 7, 2020.

³ Paragraph 17 of Gregory West's sworn declaration of February 7, 2020.

⁴ 2019 QCCS 5459,

DISCUSSION

A INTRODUCTORY REMARKS

[11] Prior to authorization, the only evidence that is admissible is that which enlightens the Court as to the fulfilment of the conditions set out at article 575 *CCP*. In addition, Plaintiffs are not allowed to discover Defendants⁵.

[12] Accordingly, the questions addressed to Mr. Gregory West have to relate to the allegations of his declaration and must not constitute a discovery. The examination is limited by the scope of the permission. The admissibility of the question will be examined in light of the assistance the questions can have to the determination of the criteria of article 575 *CCP*. Any venture into the eventual merits of the case is unwarranted.

[13] The tone of the examination is given by the introductory questions which are in line with a traditional cross-examination, aiming at attacking the credibility of a witness:

1. At paragraph 1 of your "Affidavit of Gregory West" dated February 7, 2020 (the "**Affidavit**"), you state that you have been employed by Ford Motor Company, for the last 29 years, and are presently a Design Analysis Engineer. Please confirm all functions and titles and the timeline of your past employment with Ford.
2. Are you presently employed by Ford in the same title and functions?
3. What was your specific involvement in the development and/or implementation of the various safety recall programs mentioned in your Affidavit?
4. What was your specific involvement in the design of any of the Subject Vehicles?
5. At paragraphs 3 and 4 of your Affidavit, you confirm that you have reviewed the Amended Application for Authorization to Institute a Class in this file. Did you review the exhibits in support of said Application as well?
6. When did you review the Application and exhibits?
7. Did you consult or review other documentation before signing your Affidavit and/or before providing your answers to the present questions? If so, please list the documents and communicate copies of same as Undertaking #1.
8. Isn't it a fact that Ford Motor Company, the US entity, designed and manufactured the Ford vehicles which are the subject of the present legal proceedings and which were sold in Canada (the "Subject Vehicles" in the present proceedings are the following: the 2013-2014 Ford Escape, the 2013-2014 Ford Fusion, the 2013 Ford Fiesta and the 2014-2015 Ford Transit Connect)?

⁵ *Gagnon c Audi Canada Inc.* 2017 QCCS 3201, at paragr. 25 and 26.

9. If not, please confirm who designed and manufactured each of the Subject Vehicles herein, sold in Canada.

10. Isn't it a fact that Ford Motor Company, the US entity, oversees the design and manufacture of all Ford branded vehicles worldwide, including all Ford vehicles sold in Canada?

[14] These questions were answered by Mr. West, and are not objected to. But they illustrate what the undersigned was trying to prevent by limiting the scope of the examinations. The answers sought are of no assistance in determining whether the criteria of article 575 *CCP* are met or not.

[15] Issues of credibility are reserved for the merits. As early as 2002, the legislator prevented Defendants from examining Plaintiffs on grounds other than the ones authorized by the managing judge⁶. Is not useful for the Court at this stage, to assess the credibility of Mr. West. The information conveyed by Mr. West was non controversial and was allowed in the Court record for that reason.

[16] These remarks contextualize the analysis of the questions in dispute. The questions will be addressed in the order and grouping submitted by the parties.

B ANALYSIS

A/ Group A (Q. 13, 15 to 18): Questions regarding the different model names used by Ford for the subject vehicles in other countries.

[17] On the eve of the argument on objections, Plaintiff filed a modified Application for Authorization to institute a class action which alleges recalls for other Ford models, allegedly similar to the Ford escape, particularly in Europe. Defendants were within their 10 day delay to notify⁷ their acceptance of the modifications when the objections were argued, and the admissibility of the questions must be appreciated with respect to the existing proceedings.

[18] The allegations of the Motion for Authorization, as they stand, and as they are averred, contain sufficient information to assess whether the criteria of Article 575 *CCP* are met. There appears to be no need, at the authorization stage, to import Ford's European market into the picture. At this stage, this question is better left for the debate on modification.

[19] At any rate, the questions do not stem from the allegations of the sworn declaration and were not permitted by the judgment of December 20, 2019.

⁶ See *Pharmacience inc. C Options consommateurs* 2005 QCCA 437 (Leave to appeal denied by the Supreme Court of Canada, 26 August 2006).

⁷ Article 207 *CCP*.

[20] The objection is maintained.

B- Q19: What are the differences and similarities between the 2013 1.6L Ford Escape and the 2013 1.6L Ford Kuga concerning the engine and engine cooling systems specifically?

[21] This question does not stem from the allegations of the sworn declaration. These questions are better left for an eventual merit.

[22] The objection is maintained.

C- Questions relating to which recalls listed in Gregory West's Affidavit were also issued for the Subject Vehicles in other countries (which vehicles may bear different model names given by Ford, such as the Kuga).

[23] For the same reasons, as above, the objection is maintained.

D- Plaintiff's Counsel is requesting « how many of each Subject Vehicle (each listed model and year) was sold in Canada, with a breakdown by province.»

[24] Defendants object on a number of grounds.

[25] The information could apparently be obtained from the Canadian Council of Motors Transport Administrators (CCMTA) with whom Ford contracted to receive data retrieved from a system called the Interprovincial Record Exchange, developed by CCMTA.

[26] Ford invokes Class 5.8 of the Agreement of April 12, 2006, entered into with CCMTA which provides:

5.8 CCMTA will not:

(a) disclose to others any of the information obtained from the Manufacturer under this Agreement; or

(b) use any information obtained from the Manufacturer under this Agreement for any purpose other than performing its obligations under this Agreement.

[27] This undertaking does not bind the Court. No privileges are invoked. A demonstration that the conditions for advancing a « Wigmore privilege» are met has not been offered⁸. Nor have any substantial commercial secrets arguments been offered.

[28] Plaintiff offers to keep the information confidential. If the Court were of the opinion that the information is relevant, it would have to assess whether there are public consideration interests which trump the fundamental principle of the publicity of debates,

⁸ *R. c National Post*, 2020 SCC 15; *Globe and Mail c. Canada (Attorney General)* 2010 SCC41.

as recognized at article 11 *CCP*⁹. Ms Justice Chantal Chantal Chatelain wrote in *Haric c Neveu*¹⁰:

[166] Le fardeau de démontrer une exception au caractère public de la procédure repose sur la personne qui demande de restreindre l'accès au débat. Compte tenu de l'importance de cette caractéristique essentielle de notre système de justice, laquelle est d'ordre public, il ne saurait être question d'accéder à une demande de confidentialité des débats ou de mise sous scellés au simple motif que personne ne s'y oppose.

[29] Defendants concede that the number of vehicles recalled in the province of Quebec is sufficient to satisfy the criteria of Article 575 (3) *CCP*. This admission renders the question moot as far as Quebec is concerned.

[30] Plaintiff is requesting certification of a national class. Should the jurisdiction of the Court allow such certification, the Court is satisfied from the affidavit of Mr. West and his answers that the threshold of article 575(3) *CCP* is also met for the rest of Canada. Plaintiff will not need to establish satisfaction of this criteria at authorization.

[31] The objection is maintained.

E.1 Defendants object to Question 34:

What are the differences and similarities between the 2014 Escape engine and engine cooling systems and the 2013 Escape engine cooling systems as the Plaintiff's 2013 Escape?

[32] For the reasons given above at paragraph 21, the objection is maintained.

E-2 Plaintiff is dissatisfied with the answer given to his question 35:

Q-35 At paragraph 11 of your Affidavit, you state that the Ford 17S09 recall affected certain 1.6 L engine 2013 and 2014 Ford models (including 2014 Escape) but did not affect the Plaintiffs' 2013 1.6 L engine Ford Escape Vehicle. Isn't it a fact that the 1.6L engine cooling systems affected by the 2014 Escape recall are the same engine and the engine cooling systems as the Plaintiffs' 2013 Escape?

A.35 The primary service action in 17S09 was the installation of a coolant level sensor system. The Plaintiff's 2013 Escape did not require the service action set out in 17S09 because this system was part of 13S12, which applied to the Plaintiffs' vehicle. 13S12 was performed on the Plaintiffs' vehicle around June 9, 2014.

⁹ *Lizotte c Aviva, Compagnie d'assurance du Canada*, 2016 SCC S2, at paragraph 50.

¹⁰ 2016 QCCS 3921.

[33] Article 224 (1) *CCP* provides:

The answers to a written examination are given in writing, under oath, and signed by the party or person examined. They must be direct, categorical and specific, failing which they may be rejected and the facts to which the questions pertain, held to be proved.

[34] Plaintiff is entitled to argue that the witness has failed to answer the question and that the facts are held to be proven. There is no need to order the witness to answer.

F. Plaintiff's counsel objects to the response given to his question 36 which reads :

Q-36 As you read at paragraphe 53 of the Application isn't it a fact that the 17S09 recall had been conducted by the Mont Bleu Ford dealership on Plaintiffs's 2013 Ford Escape Vehicle?

[35] Mr West provided an answer establishing his understanding of what repairs Mont Bleu Ford dealer effected on Plaintiff's vehicle.

[36] Plaintiff's counsel would have preferred a «Yes or No» answer, and argues that the answer constitutes hearsay.

[37] Witnesses are not held to «yes or no» answers and may elaborate¹¹.

[38] The question called for hearsay since Ford did not conduct the repairs. Plaintiff's counsel cannot complain.

[39] If she is not satisfied with the answers, she has the choice not to file the examination. Article 223(3) *CCP* does provide :

The examination and the answers are filed in the cour record by either of the parties..

[40] This provision departs from the greater discretion granted only to the examining party for an oral examination, at article 227 *CCP*, to file only excerpts of the examination.

[41] The rule also departs from that established for an interrogatory upon articulated facts¹² which was automatically filed in the Court record¹³.

[42] The « Commentaires de la Ministre de la Justice » are as follows on this subject :

De plus, contrairement à l'interrogatoire oral que la jurisprudence a reconnu comme étant un élément du dossier des parties, l'interrogatoire écrit- et donc les

¹¹ *J.B. Laverdure inc. C Mediterranean Shipping Company S.A.*, 2018 QCCQ 8573, at paragr. 13.

¹² Articles 405 and foll. Of the Old Code of Civil Procedure.

¹³ Article 396 Old Code of Civil Procedure.

réponses- ne fera partie du dossier du Tribunal que si l'une ou l'autre des parties l'y verse. (The Court underlines)

[43] Commenting on this article, Donald Béchard writes :

L'article 396 a C.p.c. prévoyait que les dépositions obtenues suivant un interrogatoire sous l'article 405 a C.p.c. faisaient automatiquement partie du dossier.

Les mots « l'interrogatoire et la réponse sont versés au dossier du tribunal par l'une ou l'autre des parties» (al.3) permettent de penser que le dépôt facultatif n'existerait pas. En d'autres termes, l'une des parties ne pourrait empêcher le dépôt de l'interrogatoire par l'autre partie. Le libellé laisse place à interprétation et les tribunaux pourraient être appelés à trancher cette question, d'autant plus que les débats parlementaires laissent croire que le dépôt facultatif n'existerait pas pour l'interrogatoire écrit, vu la possibilité pour l'une des parties de déposer l'interrogatoire et les réponses. Les commentaires de la ministre de la Justice sont à l'effet que l'interrogatoire ne fera partie du dossier du tribunal que si l'une ou l'autre des parties l'y verse¹⁴.

[44] The Court is of the opinion that Article 223(3) *CCP* grants a discretion to either party to file the entire examination. The Minister's commentaries are to that effect : « que si l'une ou l'autre des parties l'y verse »¹⁵.

[45] Judge Enrico Forlini wrote in *J.B. Laverdure Inc. v Mediterranean Shipping Company*¹⁶

[30] Under the C.C.P., the written examination and answers only from part of the Court file if one of the parties elects to file them in the court record whereas under the Old Code, the questions and answers automatically formed part of the court record.

[46] The Court agrees with this interpretation.

[47] The Court is invited by Plaintiff to apply the provisions of Article 228(2) *CCP* which were ruled to apply to the cross examination of an affiant pursuant to Article 222 *CCP* in the context of the authorization of a Class action: *Google Canada Corp. v Elkoby*¹⁷.

[48] It is to be noted that the examination had not been authorized pursuant to Article 574 *CCP*, and thus not circumscribed.

¹⁴ Le grand collectif. Code de procédure civile- Commentaires et annotations, Volume 1, 4^e édition, L. Chamberland (dir), 2019, Article 223.

¹⁵ Commentaires de la ministre de la Justice.

¹⁶ 2017 QCCQ 4679.

¹⁷ 2016 QCCA 1171

[49] In the present case, a written examination, limited to questions stemming from the allegations of the Sworn declaration, was the only one permitted. As appears from the extract above, these limits were largely exceeded.

[50] If Plaintiff does not like the answers, she may elect not to file this entirety of the answers. If not, she will have to accept the answers given.

[51] The objection is maintained.

G. Questions 44 to 46 read:

44 At paragraph 53 of the Amended Application for Authorization, it is alleged that Mont Bleu Ford had previously conducted the 17S09 recall on other 2013 Ford Escape models experiencing similar stalling/coolant leaking issues. Is Ford/are you aware of this?

45 How and when were you/was Ford made aware of this?

46 Please provide all documents reports, memos, correspondences, etc. regarding the conducting and/or undo of the 17S09 recall by Ford dealers/Service departments (including Mont Bleu) on any 2013 Ford Escape vehicles, in Canada and/or the USA.

[52] As clearly appears from the wording of question 44, the question stems from the allegations of paragraph 53 of the Amended Application for Authorization. This contravenes the December 20th, 2019, judgment. This is clearly an attempt at discovering defendants.

[53] The objection is maintained.

H and I

Questions regarding the audition of the new standpipe in the 2013 Ford Escape during the 13S12 Recall.

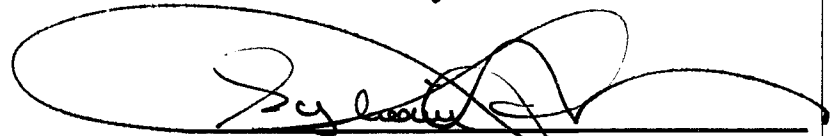
[54] Once again, the opening question refers to paragraph 64.3 of the Amended Application. In addition to the reasons given above, we are clearing moving into the merits of the case.

[55] The objections are maintained.

CONCLUSION :

FOR THESE REASONS, THE COURT :

MAINTAINS the objections
WITH COSTS.



SYLVAIN LUSSIER., J.S.C.

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Hearing date :
October 1st, 2020