

SUPERIOR COURT
(Class Action)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000794-160

DATE: June 18, 2021

BY THE HONOURABLE SUZANNE COURCHESNE, J.S.C.

SYLVAIN GAUDETTE
Plaintiff

v.

WHIRLPOOL CANADA LP
and
WHIRLPOOL CORPORATION
and
SEARS CANADA HOLDINGS CORP.
Defendants

JUDGMENT

(on Defendants' Motion to strike allegations and exhibits and Motion for leave to
depose class members)

OVERVIEW

[1] The Defendants (collectively, **Whirlpool**) present two motions at the stage of the merits of this class action case:

1. A Motion to strike allegations and exhibits;

2. A Motion for leave to depose class members.

[2] Whirlpool's demands are contested except for a partial agreement on the Motion to strike allegations and exhibits.

CONTEXT

[3] On May 5, 2020, the Court authorized the bringing of a class action by Plaintiff Mr. Sylvain Gaudette against Whirlpool, on behalf of the following class¹:

All residents in Quebec who currently own or have previously owned a Whirlpool, Kenmore, and/or Maytag Front-Loading Washing Machine without a steam feature, manufactured prior to December 31, 2008, but excluding models built on the Sierra platform starting in 2007, which include the following model numbers:

[Model numbers omitted]

(Collectively, the **Washing Machines**)

(the **Class** or **Class Members**)

[4] The common issues defined in the authorization judgment are the following:

- a) Does the design of the Washing Machines prevent the growth or accumulation of dirt, debris, scud, and/or biofilm through their intended use?
- b) If not, is the design of the Washing Machines defective and if so, what are the defects?
- c) Do those defects constitute latent defects under Article 1726 of the Civil Code of Quebec or a violation of the statutory warranties found at Articles 37, 38 and 53 of the Quebec Consumer Protection Act?
- d) If so, did the Defendants fail to adequately disclose to Class members that the Washing Machines are defective or did they do so in a timely manner?
- e) Did the Defendants breach their duty to inform the members of the Class under the *Civil Code of Quebec* and the *Quebec Consumer Protection Act*?
- f) Should an injunctive remedy be ordered to force the Defendants to recall, repair, and/or replace Class Members' Washing Machines free of charge?

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¹ *Gaudette c. Whirlpool Canada*, 2020 QCCS 1423.

- g) Are the Class members entitled to compensatory, moral, punitive and/or exemplary damages and if so, in what amount?

[5] On December 1, 2020, Mr. Gaudette instituted class action proceedings in compensatory and punitive damages against Whirlpool (the **Class Action**).

[6] He alleges that Whirlpool is liable for serious design flaws affecting the Washing Machines, which constitute latent defects under the Civil Code of Quebec and the Consumer Protection Act. These alleged defects cause, *inter alia*, the machines' failure to properly clean themselves and to remove moisture, residue and other substances that contribute to the accumulation of mould, mildew, and associated foul odours (the **Design Defect**).

[7] Mr. Gaudette purports that Whirlpool failed to remedy the situation in a timely manner and breached its duty to inform Class Members of the Design Defect.

[8] He further alleges that each Class Member was prejudiced by Whirlpools' omission to disclose the Design Defect and the required extraordinary maintenance since they would never have purchased their Washing Machine or paid as high of a price, had they been made aware of these shortcomings.

THE MOTION TO STRIKE ALLEGATIONS AND EXHIBITS

[9] At the outset of the hearing, Whirlpool withdrew its demands regarding paragraphs 21 and 23 of the Class Action.

- Allegations relying on foreign expert reports

[10] Whirlpool requests that the allegations at paragraphs 24, 29 and 39 of the Class Action as well as Exhibits P-7, P-9 and P-12 referred to therein be struck from the Court record.

[11] Mr. Gaudette accepts to withdraw the expert reports produced as exhibits P-7, P-9 and P-12, and to remove paragraph 39 of the Class Action.

[12] Consequently, Whirlpool agrees that the allegations contained in paragraphs 24 and 29 remain in the Class Action as long as they do not refer to or quote extracts from said reports, as proposed by Class Counsel.

- Photographs reproduced in the Class Action

[13] Whirlpool asks that the photographs of disassembled Washing Machines and of two different models of the Washing Machines, reproduced in the Class Action at paragraphs 13 and 27, be removed. Whirlpool contends that the origin, dates and source of these photos are unknown and that the applicable rules of evidence were bypassed by Plaintiff.

[14] Mr. Gaudette replies that these photographs appear in the Class action in support of the allegations, solely for illustrative purposes.

[15] The Court agrees with Whirlpool on this issue. The photos, instead of being simply reproduced in the proceedings without further information as to their author, dates, source and accuracy, must be filed as distinct exhibits in support of the allegations, into the Court record, in accordance with the applicable rules of procedure and evidence.² Whirlpool will then be positioned to contest or admit their authenticity.

THE MOTION FOR LEAVE TO DEPOSE CLASS MEMBERS

[16] Whirlpool seeks:

- 1) Permission of the Court to examine out of Court 35 class members to be selected at random by the Court;
- 2) An order from the Court for the communication of the original registration forms submitted by Class Members to Class Counsel and of an unredacted list of registered Class Members.

3.1 The demand to examine Class Members

[17] Whirlpool asks to examine several Class Members out of Court, for a duration of one hour per witness, on the following topics:

- Their washer histories and knowledge of biofilm and regular washer maintenance issues;
- The first manifestation of their alleged prejudice resulting from the supposed design defects;
- Notice and disclosure of the supposed defects and damages to the Defendants;
- The damages purportedly suffered and the efforts taken to mitigate them.

[18] Whirlpool contends that the proposed depositions will permit to particularize the facts alleged against it and to better assess the evidence in order to prepare a full and complete defense.

[19] More specifically, Whirlpool pleads that it should be permitted to depose a "representative sample" of Class Members in order to:

- a) verify their legitimate expectations and use of the Washing Machines and their understanding of Whirlpool's care guides and maintenance information;

² Articles 247 and following C.C.P. and Articles 2854 and 2855 C.C.Q.

- b) verify the first clear and material manifestation of the alleged mold/odor problem (for the issue of prescription);
- c) verify the existence of claimable damages and establish that there is a common absence of prejudice amongst Class Members and that the proposed common issue of consumer prejudice is at best suited for individual mini-trials;
- d) demonstrate that the failure to fulfill the pre-litigation notice requirement is common to the quasi totality of the Class;

[20] Mr. Gaudette objects to the deposition of other Class Members. Given that this case is based on a design defect and on Whirlpool's behavior in relation thereto, he contends that there is absolutely no reason to examine other Class Members at large, let alone 35 of them. He also raises concerns as to the mechanism by which these Class Members would be subjected to examinations in the absence of consent.

- **The legal principles**

[21] Article 587 C.C.P. establishes, as a rule, the prohibition of the examination for discovery of a class member, other than the representative plaintiff or an intervenor, in a class action proceeding. The Court may make an exception to this rule if it considers that such discovery is useful for its determination of the issues of law or fact to be dealt with collectively.³

[22] The judge charged with overseeing a class action is afforded considerable discretion to manage procedural questions arising after authorization is granted, including those concerning the determination of the utility of pre-trial examinations of class members.⁴

[23] The Court must determine the relevance or usefulness of such an examination in light of the common issues as framed in the authorization judgment. Three criteria are relevant to the exercise of the Court's discretion in deciding utility: (i) the principle of the disclosure of proof, (ii) the representative nature of a class action, and (iii) the proper conduct of the proceeding.⁵

[24] The examination is permitted only if it pertains to the common questions and not to the individual situations of a limited number of members⁶.

[25] The large size of the class may be inversely proportional to the utility of questioning since testimony from a small sample of members does not have the probative value necessary to meet the balance of probabilities standard.⁷

³ *Parcs éoliens de la Seigneurie de Beaupré 2 et 3 c. Blouin*, 2017 QCCA 1357 at para. 13.

⁴ *Imperial Tobacco Canada Ltd. c. Létourneau*, 2010 QCCA 2312 at para. 9; *Charles c. Boiron Canada inc.*, 2019 QCCA 1339, para. 49.

⁵ *Duguay c. Compagnie General Motors du Canada*, 2017 QCCS 2344, at para. 35.

⁶ *Lalande c. Compagnie d'arrimage de Québec Itée*, 2016 QCCS 2367 at para. 11.

[26] The Court must consider the guiding principles of procedure, to wit the rules of proportionality, proper case management and necessity to confine the case to what is necessary to resolve the dispute, as well as the parties' duty of cooperation and mutual information for a fair debate.⁸

[27] Finally, the Court must determine whether such examinations would unduly delay the conduct of the proceedings.

- **Analysis and decision**

[28] Whirlpool's demand to examine class members is presented at an early stage of the case, before Plaintiff's examination and before plea.

[29] According to Class Counsel, more than 12 000 Class Members have signed up on their website.⁹ Whirlpool contends that Members were motivated, at least in part, by the disclosure on Class Counsel's website of the 2016 settlement which put an end to all lawsuits in the United States regarding Whirlpool Front-Loading Washer Products.

[30] Some of the issues on which Whirlpool requires to examine class members are useful and relevant to answering the common questions raised by the Class Action, for the reasons that follow. However, whether the group consists of several thousand members or is considerably smaller, the Court considers that the examination of 35 Class Members is excessive, in light of the rules of proportionality and of sound case management, and should be limited to 10 Members.

[31] The seriousness of the alleged defect is one of the characteristics that will be analyzed by the Court at trial, in light of the buyer's legitimate expectations, to answer common question c). The question of legitimate consumer expectations is not the exclusive domain of experts and industry standards¹⁰.

[32] As indicated by the Court at paragraph 40 of the authorization judgment:

The evidence on the merits will determine the legitimate expectations of the consumer of the Washing Machines, taking into consideration, inter alia, the nature of the property, its intended use, the information provided to the consumers and the effects and inconvenience related to the alleged defect.

[33] Therefore, the examinations of a limited number of Class Members will shed some light on their reasonable needs and expectations towards their Washing Machines, which may in part result from Whirlpool's use and care guides.

⁷ Yves LAUZON and Anne-Julie ASSELIN, *Le Grand Collectif – Code de procédure civile : Commentaires et annotations, Volume 2, (Articles 391 à 836)*, 5e édition, L. Chamberland (dir.), 2020.

⁸ Articles 18, 19 and 20 C.C.P. ; *Ville de Gatineau c. Lespérance*, 2021 QCCA 175, para. 8.

⁹ Affidavit of Andrea Grass, sworn May 14, 2021, para. 8.

¹⁰ *Fortin c. Mazda inc.*, 2016 QCCA 31, para. 90, 99-100, 110-112.

[34] It also appears useful to interview Members to find out the existence and nature of the damages allegedly suffered. The Class Action raises a list of purported damages that result from the alleged Design Defect¹¹. The examination of Members is relevant in order to verify the existence of such damages, and may also be useful to determine if the claims can be liquidated through collective recovery.

[35] As for the issues of prescription and notice requirements, they represent grounds of defence that Whirlpool intends to raise. These questions raise mixed issues of fact and law and the Court considers that each of the potential members' personal history regarding the first clear and material manifestation of the alleged mold/odor problem with their Washing Machine and their individual notice or disclosure to Whirlpool will not add probative value nor be significant to the Court's adjudication on the common questions, as defined in the authorization judgment.

[36] The test for usefulness is not met since deposing Class Members on their personal and individual experience on these issues would not advance the litigation.

[37] Whirlpool will have the opportunity to demonstrate in support of its defense that, as alleged in its Motion for leave to depose class members, less than one percent of the purchasers of the Washing Machines actually raised a mold/odor complaint with Whirlpool.

[38] The Court authorizes the oral examination of ten members of the Group, by technological means, for a maximum of one hour per witness, on the following issues :

- Their expectations and use of the Washing Machines and their understanding of Whirlpool's care guides and maintenance information;
- The damages suffered resulting from the alleged design defects and their manifestation.

[39] Objections as to relevance shall be taken under reserve, in accordance with the provisions of article 228 C.C.P., and submitted for subsequent adjudication to the undersigned, who will dispose of the objections upon exchange of written arguments of a maximum of five pages per party.

[40] The Court agrees in part with Class Counsel's proposed *modus operandi* for the selection of the 10 Class Members:

1. The parties will agree on the wording of an email to all Class Members, in French and in English, asking them to voluntarily submit, by July 12, 2021, to an examination of no more than 1 hour; the wording of this email will be submitted to the Court for its approval on or before June 28, 2021;

¹¹ Class Action, para. 60.

2. Class Counsel will send this email to all Class Members on or before July 2, 2021;
3. Should more than 10 Class Members agree to be examined, the Court will select among these volunteers the 10 Members who will be examined;
4. In case none or less than 10 Class Members volunteer to be examined, the Court will randomly select 10 or the required number of Class Members from the list of the registered members on Class Counsel website;
5. The examinations will be held, as agreed by the parties in the case protocol, by July 30, 2021.

3.2 The demand for the registration form and the list of registered Class Members

[41] Whirlpool seeks the communication of the original registration forms submitted by Class Members to Class Counsel and of an unredacted list of registered Class Members.

[42] Plaintiff objects to the communication of these documents and contends that Class Members who registered on Class Counsel website did so with the reasonable expectation that their personal information would be kept confidential, as specifically indicated in the wording of the website.

[43] Post-authorization class members are plaintiffs and have the status of quasi-parties.¹²

[44] Registered class members have established some form of attorney-client relationship and are protected by attorneys' ethical obligations.¹³

[45] However, professional secrecy, even in the context of class actions, only extends to the communications or information intended to be confidential¹⁴. In *Belley*¹⁵, the trial judge was of the view that the class members voluntarily waived their anonymity when they registered and became "virtual parties" to the proceedings and that, as such, they did not have the expectation that their information would remain confidential. The Court of appeal agreed with this reasoning.

[46] Justice Schragger of the Court of Appeal confirmed in *Belley*¹⁶ that registered class members cannot expect "complete anonymity":

¹² *Belley c. TD Auto Finance Services Inc. / Services de financement auto TD inc.*, 2018 QCCA 1727 at para 30.

¹³ *Id.*; *Filion c. Québec (Procureure générale)*, 2015 QCCA 352, para. 43.

¹⁴ *Belley c. TD Auto Finance*, *supra*, note 12, para. 32.

¹⁵ *Belley v. TD Auto Finance Services Inc. / Services de financement auto TD inc.*, 2017 QCCS 2668, para. 38.

¹⁶ *Belley c. TD Auto Finance*, *supra*, note 12.

[41] It should be underlined that where a potential member communicates with class counsel and clearly indicates that his or her name not be disclosed, counsel cannot communicate the name. **Where class counsel invites contact indicating that communication will be dealt with confidentiality, this is not, in my view, necessarily conclusive that the identity of the member is confidential.** This determination would have to be made in context, on a case-by-case basis, applying the *Solosky* criteria. What is certain is that where class counsel contends that a class member's identity is confidential, he cannot disclose it at any stage in the proceeding for any purpose without a clear and specific waiver from each class member whose identity he proposes to divulge.

(The Court's emphasis)

[47] Only the names and province of residence were divulged in *Belley*, as ordered by the trial judge. Any other information communicated to class counsel through the website was considered privileged information.¹⁷

[48] In application of the teachings of the Court of Appeal in *Belley*, the Court will order the communication of the updated list of registered Class Members, containing only the following information:

- The Members' last name;
- Their city of residence;
- Their information on damages or symptoms experienced and other comments registered on the Class Counsel website.

(Redacted List of Registered Class Members)

WHEREFORE, THE COURT:

[49] **GRANTS** in part Defendants' Motion to Strike Allegations and Exhibits;

[50] **TAKES ACT** of Plaintiff's undertaking to withdraw Exhibits P-7, P-9 and P-12 and to remove paragraph 39 of the Class Action;

[51] **TAKES ACT** of Plaintiff's undertaking to modify paragraphs 24 and 29 of the Class Action and to remove all reference to and extracts from Exhibits P-7 and P-9;

[52] **STRIKES** the photos referred to and reproduced in paragraphs 13 and 27 of the Class Action;

[53] **GRANTS** in part Defendants' Motion for Leave to Depose Class Members;

¹⁷ *Id.*, para. 48.

[54] **GRANTS** leave to Defendants to depose a sample of 10 registered Class Members who will either volunteer to be examined or be randomly selected by the Court, as detailed in paragraph 40 of the present judgment; the selected Class Members will be examined orally, by technological means, for a maximum duration of one hour per examination, on the following topics:

- Their expectations and use of the Washing Machines and their understanding of Whirlpool's care guides and maintenance information;
- The damages suffered resulting from the alleged design defects and their manifestation;

[55] **DECLARES** that the objections as to relevance will be taken under reserve, in accordance with the provisions of article 228 C.C.P., and submitted for subsequent adjudication to the Court, which will dispose of the objections upon exchange of written arguments of a maximum of five pages per party;

[56] **ORDERS** the Class Plaintiff to communicate to Defendants an updated Redacted List of Registered Class Members, as defined in paragraph 48 of the present judgment, at the latest on June 28, 2021;

[57] **WITH** costs to follow.



SUZANNE COURCHESNE, J. S.C.

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