IN THE BAG: COURT CERTIFIES CLASS ACTION FOR WESTJET BAGGAGE FEES

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The B.C. Supreme Court recently granted certification of a class proceeding against the defendants WestJet Airlines Ltd. and WestJet Encore Ltd. (together, "**WestJet**") relating to the charging of baggage fees.[1] In doing so, the Court found common issues in the plaintiff's breach of contract and unjust enrichment claims. The Court also found that the *Competition Act* claim was not properly framed, but granted leave to the plaintiff to amend her claim to fix it.

Facts

The plaintiff alleged that WestJet's tariffs in relation to domestic and international flights at specified periods of time (the "**Tariffs**") contained conflicting provisions as to whether a fee would be charged for a passenger's first checked bag or if it would be accepted free of charge. The plaintiff's claims were for the following:

1. Breach of section 54 and 36 of the *Competition Act* (the "***Competition Act* Claims**");
2. Breach of contract; and
3. Unjust enrichment.

Section 54 of the *Competition Act* prohibits the practice of double ticketing, which is the "supply [of] a product at a price that exceeds the lowest of two or more prices clearly expressed by him or on his behalf, in respect of the product in the quantity in which it is so supplied and at the time at which it is so supplied, (a) on the product, its wrapper or container; (b) on anything attached to, inserted in or accompanying the products, its wrapper or container or anything on which the product is mounted for display or sale; or (c) on an in-store or other point-of-purchase display or advertisement.

Section 36 provides that a person who has suffered loss or damage as a result of a breach of certain sections of the *Competition Act*, including section 54, has a cause of action.

The plaintiff's proposed class comprised of all individuals residing anywhere in the world who travelled on a fare-paying itinerary on a West-Jet operated flight and paid for their first checked bag during the specified periods of time.

WestJet asserted that the statutory requirements for certification under the *Class Proceedings Act* were not met.

Analysis

A. **Do the pleadings disclose a cause of action?**

The plaintiff relied on *Lin v Airbnb, Inc*., 2019 FC 1563 ("***Lin***") in respect of her section 54 claim. In *Lin*, the plaintiff had alleged that Airbnb, Inc., breached section 54, as its platform showed one user price for accommodation on the "search results page" and a second higher price on the "listing page". At paragraph 36, the Federal Court noted that although section 54 was only applicable where "different prices are expressed in respect of the same product in terms of quantity and time of supply", the cause of action was not bound to fail. However, the Court found that *Lin* was distinguishable as the plaintiff did not allege that the section 54 breach occurred simultaneously at the point of purchase.

In respect of WestJet's argument that the plaintiff had not pled two critical elements of section 54 breach: (1) that that the prices are "clearly expressed"; and (2) that the two prices were not expressed at the time of supply), the plaintiff pled that the two prices were clearly expressed which satisfied the first requirement. WestJet's argument that publication of a price does not constitute "clear expression" required evidence and was not an issue for the certification stage. In respect of (2), the Court found that the plaintiff failed to allege that the two prices were expressed at the time of supply (i.e., travel) or at the same time, but granted leave to the plaintiff to amend her pleadings.

As the Court concluded that the pleading in respect of the section 54 breach was inadequate, it was not necessary for it to consider the pleading in respect of the section 36 claim. However, it went on to consider this issue and found that, as the plaintiff had tracked the language of section 36 consistent with her theory of the case, it could not be said that her claim was bound to fail. If the plaintiff cured the defect in her pleading in respect of the section 54 claim, then her claim under section 36 would be adequately pled.

The defendants conceded that the plaintiff had adequately pled claims for breach of contract and unjust enrichment.

B. **Is there an identifiable class of 2 or more persons?**

The Court considered that the plaintiff's claim was based on a common contract of carriage and there was no distinction in the obligations that WestJet had to Canadian class members and foreign claimants. WestJet's concerns about scope could be addressed with procedural safeguards. Accordingly, there was no reasonable basis for excluding passengers residing outside of Canada from the class as WestJet asserted.

Further, the Court rejected WestJet's argument that passengers who did not see the Tariffs prior to booking or paying for baggage fees had no claim against it, as the Tariffs bind the parties even if they have not read them.

C. **Whether the claims of the class members raise common issues?**

The issue of common issues in relation to the *Competition Act* Claims were not considered as leave had been granted to the plaintiff to amend her claim.

Common issues in breach of contract

WestJet argued that there could be no commonality among the class members as the precise terms of each contract would vary depending on the specific representations made to each passenger at the point of sale. In doing so, WestJet relied on *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37 ("***Ledcor***"), for the principle that the court may consider the surrounding circumstances if there is ambiguity in a standard form contract. However, in interpreting an ambiguous clause in a standard form insurance contract, the Supreme Court of Canada had considered the purpose of the contract in order to determine the reasonable expectations of the parties and not the reasonable expectations of any particular person, as WestJet had asserted (*Ledcor* at para 74).

The Court went on to examine *Corless v Bell Mobility Inc*, 2015 ONSC 7682 ("***Corless***"), which involved a contract of adhesion. In that case, the Court rejected the argument that each contract could be different depending on a particular customer's experience, citing the following principle with approval:

> "[a]s a practical matter, when the interpretation of any widely-utilized consumer contract is the subject of a prospective class action, it will be open to the same concern…The ability of the *Class Proceedings Act*…to respond to these circumstances would be substantially hampered, if not lost." (para 76)

However, the Court accepted WestJet's argument that the Tariffs were ambiguous and it would be necessary for the court to interpret the Tariffs at a common issues trial. Notwithstanding that, the Court found that the plaintiff had drafted the breach of contract issues narrowly and accordingly accepted them as common issues.

Common issues regarding unjust enrichment

WestJet argued that there could be no common issues in unjust enrichment because the issue of whether there was a juristic reason for enrichment would require an analysis of each individual contract. The Court rejected this, as the contract between WestJet and the passengers would either provide the juristic reason for enrichment or not.

Common issues regarding remedies

WestJet only raised one issue in respect of remedies, which was contingent on the Court finding that each passenger's contract may differ. As the Court had already rejected that argument, it was prepared to find common issues among the class members in respect of remedies.

Punitive damages

WestJet asserted that the plaintiff has failed to adequately plead particulars of conduct giving rise to punitive damages. The Court disagreed, observing that the pleadings set out the material facts relied on in support of the relief for punitive damages, and if proven, would support such a claim.

D. **Is a class proceeding the preferable procedure for the fair and efficient resolution of the common issues?**

WestJet asserted that the class proceeding would not be the preferable procedure on the basis that the breach of contract and unjust enrichment claims were not common issues. However, this argument was rejected as the Court had found otherwise.

The Court accepted that the Canada Transportation Agency could hear individual claims in respect of WestJet's baggage fees, however, adjudicating claims in this manner would not be preferable to a class proceeding due to the small value of each individual claim (~$25-35). Further, the Agency would not be able to adjudicate the unjust enrichment and punitive damages claims as the Agency was limited in the types of relief it could provide.

Parallel proceeding

WestJet raised concerns that double recovery could occur as against WestJet, as there was a Saskatchewan class action that had not yet been certified dealing with similar subject matter (in relation to collusion and price fixing as against WestJet and Air Canada).

Given that the Saskatchewan class action had not yet proceeded to a certification hearing, the within action was more procedurally advanced and although the double recovery concerns were legitimate, the Court found that they were "highly speculative".

Decision

The Court held that the plaintiff had satisfied the requirements for certification set out in section 4 of the *Class Proceedings Act* and certified the matter as a class proceeding. Certification would advance the goals of class proceedings, being judicial economy, behavior modification, and access to justice.

Leave was granted to the plaintiff to amend the notice of civil claim in respect of the *Competition Act* Claims.

Takeways

Bergen provides important judicial commentary on certification of breach of contract claims involving contracts of adhesion.

Importantly, the Court rejected WestJet's arguments that contracts between the passengers could differ depending on a particular passenger's experience with the booking process. In doing so, it followed the decision of *Corless* from the Ontario Superior Court of Justice, recognizing that the interpretation of any widely used consumer contract in a prospective class action would be open to the same concern, which would defeat the purpose of the *Class Proceedings Act*.

Once again the court has shown that it will lean in favour of certification, absent compelling reasons to decline to do so.

[1] *Bergen v WestJet Airlines Ltd*, 2021 BCSC 12 ("***Bergen***")

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A Cautionary Note