

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kirk v. Executive Flight Centre Fuel Services Ltd.*,
2018 BCSC 1742

Date: 20181011
Docket: S135927
Registry: Vancouver

Between:

Robert George Kirk, as Representative Plaintiff

Plaintiff

And:

**Executive Flight Centre Fuel Services Ltd., Her Majesty
the Queen in Right of the Province of British Columbia
as represented by the Minister of Transportation and
Infrastructure and the Minister of Forests, Lands and
Natural Resources Operations, Danny LaSante and
Transwest Helicopters Ltd.**

Defendants

And:

**Executive Flight Centre Fuel Services Ltd., Her Majesty
the Queen in the Right of the Province of British
Columbia as represented by the Minister of
Transportation and Infrastructure and the Minister of
Forests, Lands and Natural Resources Operations,
Danny LaSante and Transwest Helicopters Ltd.**

Third Parties

Before: The Honourable Mr. Justice D.M. Masuhara

Ruling

Counsel for the Plaintiff:

D.W.P. Moriarty
D.M. Aaron

Counsel for the Defendant Executive Flight
Centre Fuel Services Ltd:

K. Sherriff
R.W. Morasiewicz

Counsel for the Defendant Her Majesty the
Queen in the Right of the Province of British
Columbia as represented by the Minister of
Transportation and Infrastructure:

T. Saunders

Counsel for the Defendant Danny LaSante:

B.W. Dixon

Counsel for the Defendant Transwest
Helicopters Ltd.:

B.C. Poston
E. Dvorak (A/S)

Place and Date of Hearing:

Vancouver, B.C.
October 3, 2018

Place and Date of Judgment:

Vancouver, B.C.
October 11, 2018

[1] On May 3, 2017, this single incident mass tort action was certified as a class proceeding. The central feature of the case is a spill of approximately 35,000 litres of Jet A1 fuel into Lemon Creek, in the Slocan Valley on July 26, 2013. Inhabitants within a three-kilometre radius were ordered evacuated as a result of the spill. The trial of common issues is set to start in February 2019 and eight weeks has been set aside. The certification has been appealed and the hearing of appeal is set for October 15, 2018.

[2] This ruling deals with questions arising from a case planning conference on September 6, 2018 and an application hearing on October 3, 2018.

[3] The plaintiff seeks an order authorizing the issuance of a notice of certification with an opt-in/opt-out deadline of thirty days of the date of publication in one publication the “Valley Voice”, a free publication that is distributed to every mailing address in the evacuation zone. The plaintiff seeks the cost of the notice be shared equally amongst the parties. The plaintiff argues that the class should not be denied the fruits of its judgment and should be permitted to move forward with the trial of common issues as scheduled.

[4] The defendants oppose the notice being issued because of several deficiencies in the proposed notice; and in any event, seek the deferral of the trial until a determination of the appeal.

[5] With respect to the notice, the defendants argue that the content is insufficient for potential claimants to make an informed decision; that the thirty-day notice period is too short; that the common issues are not identified; that notice does not make clear that individual assessments of damage are to be determined subsequent to the common issues trial; that the notice does not make clear that the plaintiff is proposing a class wide basis for the evaluation of diminution of property values at the trial of common issues; that the notice does not make clear that the plaintiff has proposed that there be a determination of the best method for valuing the diminution of market value and that the plaintiff has proposed a mass appraisal framework that would be applied in the course of individual loss assessments following the common

issues trial; that the notice does not make clear the fee and disbursement arrangement with counsel; that the notice does not make reference to the pending appeal and that a determination may alter aspects of the common issues; that the posting of the notice in one local publication is not adequate as there is little information on the numbers of people who read it; that the publication does not adequately deal with non-residents; that the notice does not allow the public to determine if their property is within the class definition; and that the sharing of the costs of the notice is not justified.

[6] Beside the deficiencies as to content and process, the defendants argue that it is premature to publish the notice given that there is an appeal and that the determinations there could affect the certification. The defendants rely on several authorities including: *Watt v Health Sciences Association*, 2015 BCSC 2468 and *Ring v. Canada (Attorney General)*, 2008 NLTD 168 noting the need to avoid confusion and unnecessary cost.

[7] I agree with the defendants that the notice should not be issued pending determinations from the appeal. There are also deficiencies in the content of the notice and process the plaintiff proposes. Though plaintiff's counsel invited the court to making changes to notice and process, I think the exercise at this point would be too involved. I am also not sure about the plaintiff's position on costs for the notice and publication.

[8] As a result of the forgoing, the question that arises is what is the impact on the trial that is scheduled to start in February 2019.

[9] The plaintiff argues that the defendants have not sought a stay of proceedings and that the class should be permitted to advance to trial.

[10] While a stay of proceedings has not been sought, this court must be mindful of its responsibility in ensuring a fair and efficient process, regardless of an application for a stay. I am the management judge of this case and am sensitive to the concerns of the parties as well as the overall demands on the court system. I

am informed that the parties have attempted to mediate which indicates a level of engagement. I do not sense that there have been tactics of delay operating here. I am cognizant of plaintiff's lead counsel advising that if the current trial date is adjourned that he will not be available for a significant period of time as he will be engaged in a very long land claim trial in this court and I am aware that considerable effort was required in obtaining agreement with all counsel for the present dates for trial.

[11] Deferral of the trial date is warranted; however, I will not issue an order to this effect until the appeal hearing is concluded and the parties appear before me as soon as possible thereafter to discuss any material information arising at the hearing of the appeal that affect this case and alternate trial dates counsel have agreed upon.

“The Honourable Mr. Justice Masuhara”