CITATION: Fantl v. Transamerica Life Canada, 2015 ONSC 1367
DIVISIONAL COURT FILE NO.: 395/2013
DATE: 20150309

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

H. Sachs, D.L. Corbett and Gilmore JJ.

BETWEEN:	
Joseph Fantl Appellant/Plaintiff	*David F. O'Connor* and *J. Adam Dewer*, for the Appellant/Plaintiff
– and –	
Transamerica Life Canada Respondent/Defendant	*Mary Jane Stitt* and *Doug McLeod*, for the Respondent/ Defendant
	HEARD at Toronto: February 2, 2015

H. SACHS J.:

Introduction

[1] This is an appeal from the decision of Perell J., dated April 18, 2013, in which he declined to certify the Plaintiff's negligent misrepresentation claim. The only issue on the appeal is whether the motion judge erred by concluding that a class proceeding is not the preferable procedure for advancing the Plaintiff's claim.

[2] The proposed class in this case is composed of investors in the Defendant's Can-Am Fund, an investment fund similar to a mutual fund that the Defendant made available to investors under various insurance policies.

[3] Potential investors were provided with both an investment contract and a mandatory disclosure document called an Information Folder prior to making their investments. Key information that had to be contained in the Information Folder included a fund's investment policy and its investment objective.

[4] The Plaintiff's negligent misrepresentation claim arises from a statement in the Information Folder that the Defendant was using "best efforts" to replicate the

performance of the S&P 500 Total Return Index (the "S&P 500"). According to the Plaintiff, this representation was untrue, inaccurate and misleading.

[5] At the certification motion, the Defendant conceded that the Plaintiff's negligent misrepresentation claim "pass[ed] over the cause of action and identifiable class criteria" and accepted that there were some common issues for this claim that could be certified (Motion judge's reasons, para. 15). The motion judge found that while the Plaintiff's "litigation plan may have to be updated," he was a suitable representative plaintiff (Motion judge's reasons, para. 18). Thus, the Plaintiff satisfied four parts of the five-part test for certification under s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*Act*").

[6] However, the motion judge found that a class proceeding is not the preferable procedure for resolving the class members' negligent misrepresentation claim because, given the individual issues that would have to be determined (particularly reliance and damages), the resolution of the common issues relating to this claim would not sufficiently advance the claim.

[7] For the reasons that follow, I would allow the appeal. In doing so, I wish to make it clear that, at the time of his decision, the motion judge did not have the benefit of the Supreme Court of Canada's reasoning in *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, which was released after his reasons and provides an analytical approach to the access to justice component of the preferabile procedure inquiry.

Factual Background

[8] The Can-Am Fund was an investment fund that the Defendant offered under several different insurance contracts between October 1992 and March 2001, when the fund was closed to any new investment. However, the Defendant continued to operate the fund on behalf of the people still invested in it.

[9] The insurance contracts that permitted investment in the Can-Am Fund fell into two broad categories: (1) a variable deferred annuity policy; and (2) a universal life insurance policy, with investment features.

[10] The Can-Am Fund is a segregated fund, which, as the Defendant explained in one of its early marketing documents, is the insurance companies' equivalent of mutual funds. Like mutual funds, the fund invests in commonly-traded, liquid financial assets, charges investor management fees, and issues periodic reports to investors about how their investments are doing. Unlike mutual funds, a segregated fund cannot be purchased directly, but is only available under insurance contracts, which come with other features such as guarantees to get back a certain percentage of the principal invested on the death of the policy owner or the maturity of the policy.

[11] The Can-Am Fund is also what is known as a "synthetic" or "index" fund, which means that it is designed to duplicate the performance of a well-known stock index; in this case, the S&P 500.

[12] The contracts of insurance in question were sold in every province and territory except Nunavut. With the exception of three individuals, all of the sales of the contracts in issue were made through independent advisors who were not employed by the Defendant.

[13] The Plaintiff's class action encompasses 53 different insurance contracts. Five of these contracts contained an express S&P 500 Best Efforts Statement; 48 of them did not. However, before these 48 contracts were sold, each policy holder would have received an Information Folder that mentioned that the goal of the Can-Am Fund is to replicate, on a Best-Efforts basis, the performance of the S&P 500 Total Return Index.

[14] The motion judge certified the Plaintiff's action for breach of contract, which related to the claims based on the five insurance contracts that contained an express "Best-Efforts" clause. He did not certify the action in relation to the other 48 contracts, which includes tens of thousands of investors in the Can-Am Fund.

[15] Before investing in a segregated fund like the Can-Am Fund, regulations in the Ontario *Insurance Act,* R.S.O. 1990, c. I.8 required that investors receive a mandatory disclosure document called an "Information Folder". The key information that must be disclosed in the Information Folder includes the fund's investment policy and investment objectives. Starting in 1994, every Information Folder contained a description of the Can-Am Fund essentially identical to the following:

> **Can-Am Fund.** Investments include Canadian Treasury Bills and Standard and Poor's 500 Stock Index Futures Contracts, (and when necessary, other derivative products), which together, on a best efforts basis, will replicate the performance of the S & P Total Return Index. The investment objective of this fund is long-term accumulation of capital through the appreciation and reinvestment of net income.

[16] The Defendant has acknowledged that each class member was required to receive and to acknowledge receiving an Information Folder before investing in the Can-Am Fund.

The Motion Judge's Decision on Preferable Procedure

[17] The motion judge found that the common issues posed by the Plaintiff for the negligent misrepresentation claim only addressed two of the five constituent elements of the tort of negligent misrepresentation, namely (1) a duty of care; and (2) an untrue, inaccurate or misleading representation. According to the motion judge, these elements are the least contentious elements.

[18] Left to be addressed through individual issue trials are (3) whether the Defendant made the representation negligently; (4) whether the Plaintiff reasonably relied on the misrepresentation; and (5) whether the Plaintiff suffered damages as a consequence of relying on the misrepresentation.

[19] The motion judge acknowledged that the Plaintiff might envisage that the common issues trial would also address the proof of negligence element of the tort (on this appeal, the

Plaintiff was clear that he was proposing that this issue be a common issue), but found that even so, the issues of reliance and damages were "critical, difficult and contentious".

[20] In the motion judge's view, the issues that would be tried in the contract claim that he did certify would "not much assist the prosecution of the tort claim" (at para. 213).

[21] The motion judge also found that this was not a case where the claims of the policy holders "are so small that access to justice would not be available absent a class action" (at para. 215). By way of example, according to the motion judge, the representative plaintiff had invested approximately $100,000, and "over the course of many years, he was making decisions about how much to allocate of the $100,000 to the Can-Am Fund". Thus, according to the motion judge, the Plaintiff had the alternative of an action in the Superior Court and "some efficiencies would be achieved if other policyholders were joined as party plaintiffs".

[22] The motion judge concluded his analysis on the preferable procedure criterion as follows:

> [217] Balancing the common issues for the negligent misrepresentation claim against the individual issues, in my opinion, the case at bar is one of those cases where the common issues are overwhelmed or subsumed by the individual issues such that the resolution of the common issues will, in substance, mark just the beginning of the process leading to a final disposition of the claims of class members.
>
> [218] I recognize that negligent misrepresentation claims have been certified in other cases; however, in my opinion, a class action is not the preferable procedure for the negligent misrepresentation claims in the case at bar.

Standard of Review

[23] The decision of a motion judge as to preferable procedure is a decision involving the weighing and balancing of a number of factors. As such, these decisions are normally entitled to special deference and a reviewing court should only intervene where the judge has made a palpable and overriding error of fact or otherwise erred in principle (*Pearson v. Inco Ltd.*(2005) 78 O. R. (3d) 641 (C.A.)).

[24] In this case, as I have already pointed out, the motion judge did not have the benefit of the Supreme Court's decision in *AIC Ltd. v. Fischer* and the analytical approach to the preferability inquiry it mandates. In *Bayens v. Kinross Gold Corporation*, 2014 ONCA 901, at para. 107, the Court of Appeal found that this was a reason to lessen the deference normally owed to the motion judge's certification analysis.

Analysis

[25] In order to satisfy the preferable procedure criterion, a plaintiff must establish that there is some basis in fact for the claim that (1) a class proceeding would be a fair, efficient and

manageable method of advancing the claim; and (2) a class proceeding would be preferable to any other reasonably available means for resolving the claim. Further:

> To establish some basis in fact for the preferable procedure criterion, the court does not consider whether the claim is likely to succeed; rather, it asks whether the claim should be permitted to proceed as a class action because that procedure would facilitate the three principal goals of class proceedings – judicial economy, behaviour modification and access to justice. (*Bayens v. Kinross,* at para. 123).

[26] As *AIC v. Fischer* makes clear, at this stage of its analysis, the court is not asking whether the class action would actually achieve these three goals, but "whether other available means of resolving the claims are preferable" (at para. 23).

[27] In its earlier decision, in *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 33, the Supreme Court held that a class action advances the goal of access to justice if: (1) there are access to justice concerns that the class action could address; and (2) these concerns would remain were class members to advance their claims by the alternative procedures under consideration.

[28] In *AIC v. Fischer*, the Court set out five analytical questions for the court to pose in determining whether a class proceeding will facilitate access to justice in both the procedural and substantive sense.

[29] The first of these questions is "What are the barriers to access to justice?" At para. 27 of *AIC v. Fischer*, the Court notes that:

> The most common barrier is an economic one, which arises when an individual cannot bring forward a claim because of the high cost that litigation would entail in comparison to the modest value of the claim.

[30] In the case at bar, the motion judge concluded that this barrier to access to justice did not exist as the claim was one that could be pursued in the Superior Court. The evidence he relied on in support of this proposition was the fact that the representative plaintiff made an investment approaching $100,000.

[31] The motion judge is correct that the only evidence on the record concerning the economic barrier came from the representative plaintiff. However, that evidence, properly understood, supports the conclusion that this is a case where an individual cannot bring forward a claim because of the high cost of litigation relative to the value of the claim.

[32] The representative plaintiff invested $27,000, not $100,000, into the Can-Am Fund. Further, he could only hope to recover a small portion of that amount by way of damages. The measure of damages in this case will be the amount that places the Plaintiff in the same position he would have been in if the statement had not been made, which, at best,

might simply be the difference between what he would have earned had he, instead, invested in a fund with better investment methods for synthesizing the performance of the S&P 500 and what he did earn by investing in the Can-Am Fund in reliance on the misrepresentation. Thus, the value of his claim cannot reasonably be viewed as one that would be economically viable to pursue in the Superior Court.

[33] The second question that must be asked is "What is the potential of the Class Proceedings to Address Those Barriers?" With economic barriers, "[a] class action may allow members to overcome [those] barriers 'by distributing the fixed litigation costs amongst a large number of class members…[and thus] making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own'" (*AIC v. Fischer,* at para. 29).

[34] In the case at bar, there are tens of thousands of potential class members. While the damages on an individual basis might not be sufficient to justify litigation, on an aggregate level they could be significant, making this a classic situation where something that would be economically unfeasible to pursue by way of ordinary litigation becomes economically feasible to pursue by way of a class action.

[35] The last three questions require the court to consider the reasonable alternatives that exist to resolve the Plaintiff's claim and to compare that alternative to that of the class proceeding. In this case, there is no alternative other than an individual action and, contrary to the finding of the motion judge, the damages at issue in this case do not make this alternative a reasonable one to pursue. Thus, viewed through the lens of promoting access to justice, a class action is clearly the preferable procedure for resolving the Plaintiff's claim.

[36] I agree with the Defendant that access to justice is only one component of the multifaceted inquiry that the court must make when determining the preferable procedure requirement. In other words, the Supreme Court's decision in *AIC v. Fischer* does not displace or eliminate the requirement that the proposed class proceeding must be a fair, efficient and manageable method of resolving the claims.

[37] The motion judge's reasons demonstrate that he felt that this aspect of the preferable procedure test was not met because the determination of the common issues would not sufficiently advance the claims. In the view of the motion judge, the most contentious and difficult issues would still have to be determined by way of individual trials.

[38] The motion judge's reasons concede the possibility that three of the five constituent elements of the tort at issue could be disposed of by way of a common issues trial; namely, whether the Defendant owed the Plaintiff a duty of care, whether the Defendant made an untrue, inaccurate or misleading misrepresentation and whether the Defendant was negligent when it made this misrepresentation. According to the motion judge, the first two elements "are the least contentious constituent elements" because the Defendant was statutorily obliged to provide an Information Folder and had a corporate policy of insisting that its insurance advisors provide information advice (para. 210).

[39] I agree with the motion judge that these facts might support the assertion that establishing a duty of care may not be a highly-contentious aspect of the litigation. However, they do not support the claim that the other common issues that the Plaintiff seeks to certify – the untrue, inaccurate or misleading nature of the representation and the fact that the misrepresentation was made negligently – would not be highly contentious.

[40] The evidence required to establish these two elements of the tort could be expensive and complicated, involving an expert examining how the monies of the Can-Am Fund were actually invested and managed, expert evidence about available methods or investment strategies for replicating or synthesizing the performance of the S&P 500 and findings about what the Defendant knew or should have known about these methods and how the methods it actually employed measured up against them.

[41] Further, contrary to the finding of the motion judge, this evidence will overlap with the evidence required for the common issues trial on the breach of contract claim. To establish a breach of the "best-efforts" replication clause in the contracts, the Plaintiff will also have to have an expert examine how the Can-Am Fund was actually invested and managed and lead expert evidence concerning how it should have been managed to replicate the performance of the S&P 500. In *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236, the Court of Appeal held that where there is substantial overlap between two legal claims advanced in the same proceeding and each claim raises common issues, a decision to certify one of the claims weighs heavily in favour of certifying the other.

[42] With respect to the motion court judge's finding that the individual issues in this case overwhelm the common issues, I agree that there is strong support in the case law for the proposition that common law negligent misrepresentation claims are not suitable for certification because these claims are inherently reliance-based, which, in turn, gives rise to individual issues that would be unmanageable. The Court of Appeal most recently adverted to this principle in the context of securities cases in *Bayens v. Kinross*, at para. 136. However, as the Divisional Court noted, in *Ottawa Police Association v. Ottawa Police Services Board*, 2014 ONSC 1584, at para. 59:

> The jurisprudence on class action proceedings for negligent misrepresentation distinguishes between those cases where there have been multiple misrepresentations to individuals and those cases where there has been a single representation made to members of the class.

[43] In contrast to negligent misrepresentation cases involving multiple representations (such as *Bayens v. Kinross* and *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, [2012] O.J. No. 3072), courts have certified negligent misrepresentation claims involving a single written representation, a uniform set of misrepresentations, or even a number of separate representations "all having had a common import," notwithstanding the need to prove reliance and damages individually. See: *Ottawa Police Association v. Ottawa Police Services Board*, 2014 ONSC 1584 (Div. Ct.), at para. 59; *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399, at paras. 340 & 350-351; *Ramdath v. George*

Brown College of Applied Arts and Technology, 2010 ONSC 2019, at para. 103; *Carom v. Bre-X Minerals Ltd.,*, at paras. 48-49; *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, [2003] O.J. No. 2069 (Div. Ct.), at para. 35; *Lewis v. Cantertrot Investments Ltd.*, [2005] O.J. No. 3535 (S.C.), at para. 20; *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2006), 267 D.L.R. (4th) 601 (Ont. C.A.); *Murphy v. BDO Dunwoody*, [2006] O.J. No. 2729 (S.C.); *Silver v. IMAX Corp.*, [2009] O.J. No. 5585, 86 C.P.C. (6th) 273.

[44] This case involves one uniform written representation that was included in a disclosure document required by legislation, that was given to each class member and that each class member acknowledged receiving. To prove actual reliance, the class members do not need to prove that the misrepresentation was the only factor that induced them to invest in the Can-Am Fund, but simply that they relied on the misrepresentation (*NBD Bank, Canada v. Dafasco Inc.* (1999), 46 O.R. (3d) 514, (C.A.), at para. 78, leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 96). Thus, the individual inquiries with respect to reliance need not be complex.

[45] I agree with the motion judge that the issue of damages may be a more complex issue to resolve on an individual basis. However, as Justice Strathy stated, in *Brown v. Canadian Imperial Bank of Commerce*, 2012 ONSC 2377, 24 C.P.C. (7th) 251, at para. 195:

> I do not regard the potential need for individual assessments as detracting from the preferability of a class action. Not only is this factor specifically excluded from consideration by s. 6(1) of the CPA but practical experience has shown that systems can be devised for the fair and efficient resolution of such issues.

[46] In conclusion, not only is a class proceeding the only reasonable way to remove the economic barriers to resolving the Plaintiff's claim, it would be a fair, efficient and manageable method of advancing the claim. Three of the five elements of the tort at issue could be resolved through a common issues trial. At least two of these elements are likely to be highly contentious and will require the calling of expert evidence that will also have to be called to prove the claim that has been certified. The common issues trial will significantly advance the litigation without involving the expenditure of large additional judicial resources. The two elements that remain to be established through individual trials (reliance and damages) may well become issues that can be resolved through fairly straightforward mechanisms.

[47] Thus, two of the three goals of class proceedings – judicial economy and access to justice – would be facilitated by certifying the Plaintiff's negligent misrepresentation claim. The claim is one involving an alleged misrepresentation in a statutorily-mandated insurance investment document, behaviour that society has an interest in curbing. Certifying the negligent misrepresentation claim could also help promote the third goal of class proceedings, behaviour modification.

Conclusion

[48] For these reasons, the appeal is allowed and an order is to go certifying the Plaintiff's claim for negligent misrepresentation. For greater clarity, we agree that questions dealing with all the elements of this action other than reliance and damages can be tried as common issues. Failing agreement, the parties may address us in writing on the issue of costs. The Plaintiff shall make his submissions within ten days of the release of these reasons and the Defendant shall have ten days to respond.

H. SACHS J.

D.L. CORBETT J.

GILMORE J.

Released: 201503 09

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REASONS FOR JUDGMENT

H. SACHS J.

Released: 20150309