SUPREME COURT OF NOVA SCOTIA

Citation: Matheson v. Wood World Markets/Marches M, 2011 NSSC 85

Date: 20110228
Docket: Syd. No. 317830
Registry: Halifax

Between:

Donald Matheson

Plaintiff

v.

CIBC Wood Gundy c.o.b. Wood World Markets/Marches M

Defendants

Judge:	The Honourable Justice Arthur J. LeBlanc.
Heard:	January 6, 2011, in Halifax, Nova Scotia
Written Decision:	February 28, 2011
Counsel:	George W. MacDonald, Q.C., for the plaintiff Michael S. Ryan. Q.C., for the defendants

By the Court:

[1] In this motion the defendant seeks to convert an Application in Court to an Action pursuant to *Civil Procedure Rule* 6, and to stay these proceedings until a certification application under the *Class Proceedings Act* is decided.

[2] The defendant submits that in considering this motion the Court should be aware of three proceedings: *Frederick Saturley v.CIBC World Markets Inc.* - Hfx No. 30563; *Donald Matheson and Carolyn Matheson v. CIBC World Markets Inc.* - Sydney No. 317830; and *Crooks et al v. CIBC World Markets Inc.* - Hfx No. 322441.

Background

[3] The plaintiffs dealt with Frederick Saturley for investment advice and strategies. Saturley utilized an investment strategy called “strangle option strategy”. This strategy involved selling uncovered options on EEM as the underlying security. The objective of the strategy was to generate premium income. The plaintiffs’ positions were margined. The EEM split 3 for 1 on July 24, 2008. The defendant failed to account by failing to adjust the plaintiffs’

margin calculations. The defendant discovered this omission on October 8, 2008. The plaintiffs allege that as a result of this failure their margin requirements were overstated three fold. As a result, the defendant closed out all open EEM option positions.

[4] In addition to the plaintiffs' Application, a number of other investors have initiated a class action proceeding against the same defendant bearing cause Hfx. No. 322441. The claims that they advance as representative plaintiffs and potential class members are similar to the one advanced by the plaintiffs. There is agreement that the alleged damages claimed in this proceeding are the same as those claimed in the class action proceeding. In addition to this application and the class action proceeding, Frederick Saturley has commenced a proceeding against CIBC World Markets on account of his dismissal. That proceeding is defended and the defendant has counterclaimed.

Issues

[5] The issues are (1) whether the Application should be converted to an Action and (2) whether the proceeding should be stayed pending a determination of

whether the class action proceedings will be certified pursuant to the *Class Proceedings Act*.

Motion to convert application to action

[6] Rule 6.02 provides that a party who proposes that the claim be determined by an action rather than an application has the burden of satisfying the judge that such an order should be made. The burden is clearly on the defendant to establish that the application should be converted to an action. The burden does not change simply because there is a related class action proceeding filed which has not yet been certified. Under Rules 6.02(3) and 6.02(4) there are certain presumptions that a Court should consider in considering whether to convert to an action but such presumptions are not factors that I need consider in deciding this application. It is necessary, however, to consider the factors enumerated in Rule 6.02(5), which provides:

> (5) On a motion to convert a proceeding, factors in favour of an application include each of the following:
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> > (a) the parties can quickly ascertain who their important witnesses will be;

> (b) the parties can be ready to be heard in months, rather than years;
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> (c) the hearing is of predictable length and content;
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> (d) the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross-examination.

[7] These factors are not exhaustive. There may be other factors that the Court should consider before deciding on the application.

[8] The defendant claims that the fact that there is a parallel class proceeding is the basis upon which this proceeding should be converted to an action. The plaintiffs have indicated that they are not going to be a party to any class proceeding, and that if they are named in the class proceeding, they will opt out. I believe the class proceeding is not particularly relevant to this motion. If is determined at a future date that the class proceeding and this proceeding should be tried together, the defendant will be entitled to bring a fresh motion to convert at the appropriate time.

[9] I do not agree with the defendant's submission that if there is delay of proceeding with the class action, those same complications and delay would also apply to this proceeding if it were converted to an action.

[10] In addition to the issue of the parallel class proceedings, I need to consider the factors enumerated above. I refer to *Brodie v. Jentronics Ltd*., 2009 NSSC 399, where Moir, J. stated, at para. 6, that "the Rules invite the bar and the bench to make use of the application route to achieve lower costs and greater speed".

[11] I am satisfied that the underlying application is principally about the legal significance of agreed-upon events and the resulting relief and the quantification of damages. The parties confirm that the important witnesses have been identified. Furthermore, there is no evidence that the defendant cannot be ready in a matter of months. The parties have also agreed that it will take a maximum of five days to complete the proceeding. The plaintiff claims that would take no more than two days while the defendant estimates that the matter can be dealt with in five days.

[12] It is necessary to consider whether the application route is sufficient for the defendant to test the credibility of the evidence proffered by the plaintiffs. The

mere fact that credibility is an issue will not, on its own, be sufficient to convince the Court that the action is preferable route. Rule 6.02(5) contemplates that credibility may be an issue in an application: see *Citibank Canada v. Begg*, 2010 NSSC 56, at para. 17. In *Kings County v. Berwick (Town)*, 2009 NSSC 398, Warner, J. commented on the difference between an application in court and a full trial and said, at para. 38:

> The difference between an application in court and a full, traditional trial, is that direct evidence in an application is primarily given by way of affidavit. An affidavit is usually formulated by counsel, or with the assistance of counsel, and is usually a fairly articulate and focussed presentation by a witness of what facts he or she wants the court to receive. It is usually far more focussed and helpful to the court, than rambling oral evidence that sometimes is sidetracked into matters unrelated or less directly related to the real issues.

[13] As to whether credibility could be adequately addressed in the context of an application rather than an action Warner, J. stated at para. 39 that "[s]eldom is credibility decided by direct examination and probably less in the context of this kind of proceeding where the factual evidence is of context. Cross-examination is the real tool for discovery of truth." He quoted Sopinka et al., *The Law of Evidence in Canada,* 3d edn., at para. 16.112, where the authors wrote:

> The oft quoted words of Wigmore that cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth" indicate its great

> value in the conduct of litigation. Three purposes of generally attributed to cross-examination:
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> > (1) to weaken, qualify or destroy the opponent's case;
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> > (2) to support the party's own case through the testimony of the opponent's witnesses;
> >
> > (3) to discredit the witness.
>
> . . .

[14] The Supreme Court of Canada, in *R v. Lyttle*, reaffirmed the principle... The Court emphasized the importance of cross-examination. Cross-examination, the Court said, is a "faithful friend in the pursuit of justice and an indispensable ally in the search for truth; and should be "jealously protected and broadly construed."

[15] Warner, J. went on to say, at para. 40:

> 40 Applications in court permit cross-examination, which can be unlimited. Cross-examination is the tool to test credibility in a trial and it is preserved in an application in court. Whether I suspect that direct examination in trials is overrated or not, it is my sense that the issues of facts in this proceeding relate more to reliability than credibility; in either event, the opportunity to cross-examine in the hearing of an application in court is more than enough to satisfactorily assess credibility.

[16] In *Citibank Canada*, *supra*, which involved an application to convert an application to an action, Bryson, J. (as he then was) denied the application and made the following comments at para. 32:

> While I am satisfied that the claims and defences to it can proceed by way of application, I did have some initial reservations about how to accommodate Maritime Travel's cross-claim and potential third party claim within an application. But on reflection, these can be adequately addressed in other ways. First, it may be that the cross-claim involves sufficient overlap in issues and evidence that the motion for directions could include it. But if not, that can be a separate application, heard in conjunction with this one. The potential third party claim is not inextricably bound up with Maritime Travel's defence. The defence of Citibank's claim should not be compromised if the third party issues go ahead by way of separate proceedings. That is not to say that documents between Citibank and the third parties may not be relevant to Maritime Travel's defence. But those documents and any related discovery can be provided for in the Motion for Directions.

[17] I note that if it becomes evident that this proceeding has become very complicated, including the question of whether the class proceeding should be certified in the context of this application and whether this application should be consolidated with the class proceeding, it may be appropriate re-consider the application to convert from application to action: see Citibank at para. 33.

[18] Therefore, I am denying the conversion application.

Motion to Stay

[19] The defendant seeks to stay the Application until a decision is made on whether the class proceeding is certified. The defendant submits that the Court should apply s. 16 of the *Class Proceedings Act*, which provides that the Court "The Court may at any time stay or sever any proceeding related to the class proceeding on the terms or conditions the court considers appropriate". The defendant cites Ward Branch, *Class Actions in Canada*, at para. 15.230, where the author writes:

> Parties in other actions related to the class proceedings should be prepared to offer an evidentiary basis justifying early and separate determination of their case. Given the length of time required to resolve a class-action, there may well be health or other reasons requiring a particular class member to seek a more speedy resolution.

[20] The defendant also refers to *Vigna v. Toronto Stock Exchange*, [1998] O.J. No. 4924, where the plaintiff had initiated proceedings in the Small Claims Court which related to a developing class action. The defendant applied to have the action transferred to the Superior Court or to have it stayed pending resolution of the class proceeding certification. The Court denied the application to transfer, but

granted a stay in the individual proceeding until the certification application was determined.

[21] The defendant argues that the plaintiffs bear the burden of proving that they should be entitled to proceed by separate proceeding rather than joining a class proceeding. They say this is consistent with the underlying purpose of class proceedings legislation: to provide a mechanism for the resolution of common claims shared by a large number of plaintiffs. This is particularly so where the facts and issues in the application filed by the plaintiffs largely mirror those in the class proceeding.

[22] There are a number of cases which I have considered on the issue of staying an individual action advancing a similar claim to that set out in a class proceeding. In *Giles v. Westminster Savings Credit Union,* 2002 BCSC 1583, a group of investors brought two actions against the same defendants arising out of the same factual background. Group A brought their action as a class proceeding. Group B brought their action as a multi-party action with a large number of individual claims. Group A was further divided into two types of potential claimants, X. and Y. Group B was comprised entirely of plaintiffs who could be characterized as

potential class X claimants. One defendant brought an application to stay the Group A matter until after the completion of the Group B matter. The Court had to determine which, if any matters to stay. The Court held, as a general proposition, that class proceedings were preferable to a multiplicity of proceedings in multi-party litigation. However, the Court refused to stay the Group B matter pending the disputed certification of the Group A matter. The Court noted that the vast majority of the putative class members had chosen to bring their claims with Group B.

> Although there are procedural advantages generally, as I have indicated, with proceeding to certification under the *Class Proceedings Act*, in these circumstances weight must be given to the fact that the plaintiffs in the Giles Action have selected their counsel, represent almost all of a possible class, and do not wish to proceed to certification or as a representative action. Even if they are part of a class certified in the Dextras Action, they have the right to opt out. Proceeding to a possible certification in the Dextras Action may be costly and time consuming. It is apparent to me that certification will be hotly resisted by some of the defendants and although there might be certification on some basis, if common issues are found (as suggested by Ms. Milton and Mr. Lemer), there remains, I think, a serious risk that the class proceeding will not be certified. The individual Giles Action plaintiffs will likely still wish to proceed.

[23] In *Dumoulin v. Ontario*, [2004] O. J. No. 2778, there were two related proceedings, a class action that was yet to be certified and an individual action, both matters stemmed from the same factual background. Cullity, J. refused to permit the defendant to extend the time for delivery of a statement of defence in the

individual action while the class action was proceeding. The Court held that it would be inappropriate, absent prejudice on the part of the moving party, to use the *Class Proceedings Act* to inhibit an individual action. Cullity, J. said, at paras. 8-11:

> The CPA was not intended to prevent, or impede, actions by individuals for no other reason than they are, or may be, members of a putative class in an action commenced by another party. Even if Ms Verkerk's medical condition was not as serious as the evidence indicates, she would suffer prejudice by reason of the delay in progressing with her action. The effect of the order would, as her counsel submitted, be to stay her action indefinitely. Although counsel for ORC emphasized that the order it sought could be open to review by the court at any time, or times, the general thrust of his submissions was that the Verkerk action should proceed in tandem with the class action - at least until the hearing of the motion to certify the latter - because the latter would "overshadow" it.
>
> Section 13 of the CPA permits the court, on its own initiative or on a motion by a party or class member, to stay a proceeding related to a class proceeding before it. There is no motion for a temporary stay before me but, as Ms Verkerk's counsel submitted, the effect of the order requested would be the same. If the Dumoulin action is certified while Ms Verkerk's action is continuing, a stay would very likely be granted if she failed to opt out of the class proceedings...
>
> *Ms Verkerk deposed that she does not wish to be part of the class action and, if it is certified, she will exercise her right to opt out*. Whether or not that statement would give rise to some form of estoppel, I do not see any sufficient reason why, at this stage, she should be ordered to put her action on hold until December 20 of this year - the date on which the motion to certify has been tentatively scheduled to be heard - or some later date if, as may happen, the schedule is revised between now and then.
>
> *There is no evidence, and there was no suggestion, that ORC will suffer any significant prejudice if it is now required to deliver a statement of defence in the*

> *Verkerk action. The fact that it would prefer, or find it more convenient, or less troublesome, not to do so is not sufficient.* [Emphasis added.]

[24] In *Northfield Capital Corp. v. Aurelian Resources Inc.* (2007), 84 O.R. (3d) 748, an application to stay an individual action where the plaintiff had stated that it would opt out of any class, Ground, J. stated, at para. 39, that "the court's jurisdiction to grant a stay should be exercised sparingly and only in the clearest of cases where they would be an injustice or prejudice to the moving party if the stay is not granted. I am not satisfied that Aurelian has met this onus in the circumstances of this case at this particular time. There is no convincing evidence of injustice or prejudice to Aurelian if this action is not stayed at this time."

[25] *Dumoulin* and *Northfield* were referred to in *Abdulrahim v. NAV Canada* [2010] O.J. No 4660. I have been unable to locate any Nova Scotia jurisprudence on this question.

[26] I find the approach in *Dumoulin* and *Northfield* persuasive. The plaintiffs' counsel, has indicated that it is the plaintiffs' intention not to be part of a class proceeding. If they are certified as members of a class, they indicate that they will opt out. Furthermore, I have no evidence from the defendant that they will suffer prejudice or injustice if the stay is not granted. The burden is on the defendant to

prove that prejudice or injustice will occur. The defendant recognizes the plaintiffs' right to opt out of a class proceeding, but argues that the plaintiffs may change their minds. I am not satisfied that this suggestion displaces the absence of evidence of prejudice.

[27] As a result, the application for a stay of the proceedings is dismissed.

[28] If the parties are unable to agree on costs, they can submit their positions in writing within the next 30 days.

J.