

SUPREME COURT OF NOVA SCOTIA

Citation: Shane v. Allen, 2011 NSSC 285

Date: 20110622

Docket: Hfx No. 316695

Registry: Halifax

Ruth Shane and Wilma Lee Shane

Plaintiffs

and

John Allen, The Toronto-Dominion Bank,

The Canada Trust Company, Keybase Financial Group Inc.,

B2B Trust, Global Maxfin Investments Inc.,

AGF Trust Company and Dundee Private Investors Inc. Defendants

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Heard: June 22, 2011

Written Decision: Oral decision transcribed, edited, and signed on July 8, 2011

Proceedings: As in the heading and eight other proceedings bearing court numbers Hfx No. 339660, Hfx No. 343599, Pic No. 300385, Hfx No. 343611, Pic No. 306313, Hfx No. 327381, Hfx No. 343604, and Tru No. 327213

Counsel: Jennifer J. Langille, for plaintiffs

Brian K. Awad, for defendants Keybase Financial and Global Maxfin Investments Inc.

Matthew W. Pierce, for defendant Dundee Private Investors

Moir, J. (Orally):

[1] The plaintiffs, according to the Notice of Motion, move to consolidate nine actions. However, counsel's submission is for something other than consolidation. It recognizes that there would be some issues that would be tried together and other issues that could not be tried together. Whatever device one would choose to achieve such an objective, it is beyond simple consolidation. It is either consolidation followed by severance with direction as to how the severed issues get tried or, more likely, a motion for separate trial of common issues under 37.04.

[2] In either case, I am dismissing the motion for two reasons. Firstly, I will not grant a motion for consolidation, or for trial of common issues and further trials of individual issues, when the plaintiffs have not signified whether they require jury trial. If there is any suggestion that the cases are to be tried by a jury or that some of them are tried by a jury that is preclusive of a separation of liability issues from damages issues. It is preclusive as well of separation of some liability issues from other liability issues and some damages issues from other damages issues. So, the motion is dismissed for that reason alone.

[3] Secondly, I do not consider that the court is at this stage sufficiently furnished with information about the claims to be able to make a reasonable assessment of which issues could be tried in common and which issues have to be set to be tried individually.

[4] As Mr. Awad suggests, the issue of vicarious liability is likely one that could be common. It may even be one that could be determined separately as a question of law. Negligent supervision could be a common issue. There may be a sub-issue about causation that would have to be set off as individual. I simply do not have enough evidence about the case to make that conclusion. The supervision issue could be a common issue if we see it to allege systemic problems as opposed to a one time failure. Again, I would need to be furnished with information to make that kind of assessment.

[5] Punitive damages cannot be determined until after the assessment of compensatory damages because compensatory damages have to be taken into consideration in settling the amount of punitive damages. It is also the case that any liability for punitive damages will depend upon the culpability toward each individual not culpability toward the group as a whole. Again, I am not furnished

with information by which I can assess whether individual culpability is that important or not.

[6] The allegation of fraud could be individual depending on whether it is alleged to be systemic. I am not in a position to make that assessment either.

[7] Turning to the cause of action in negligence. As Mr. Pierce points out, even the duty itself, when it goes beyond an investment advisor's obligation to see to the execution of the client's orders and the fundamental and simple obligations of an investment advisor becomes rather individualistic. Again, it may be of that all of the cluster of issues around negligence can be reduced to something common and the differences will not matter, but I have not been furnished, by evidence, with enough information to make that kind of assessment.

[8] The consequential damages are individual to each client. I must say that the process of assessing the individual damages will be eased a great deal by findings that are common if the cases have enough commonality between them. At this stage, all I can say is that the consequential damages require their individual assessment.

[9] The issue of aggravated damages is individual because it is meant to compensate the plaintiff for the plaintiff's own loss and that is not exactly the same in every case. Again, unless evidence shows that everyone was treated the same way and everyone had roughly the same reaction to the treatment aggravated damages requires individual assessments. I have not been furnished with evidence suggesting that.

[10] All in all, these are not, at this stage, cases for consolidation or for ordering trial of common issues followed by individual issues.

[11] So, for those two reasons, the motion is dismissed. It is dismissed without prejudice to the plaintiffs' ability to apply in future when they are in a position to give the court fuller information as to the facts underlying what the plaintiffs claim are common issues. There is also a motion to permit the consolidated heading to refer to one plaintiff and to refer to the others as "et al". The *Civil Procedure Rules* provide for naming the individual parties even in cases in which there are hundreds of plaintiffs or hundreds of defendants. Sometimes we use a schedule. So, even if I had granted a consolidation, I would not have granted that relief.

[12] There was also a motion to set the trial dates. Trial dates are available under the Rules only after discovery of parties has been conducted. They are available much earlier now than they were under the old Rules. The bar is not very high, but there is a bar and it has not been reached in this case.

[13] The one way trial dates can be set without reaching the bar is through case management. If the parties were interested in it, I would direct the Prothonotary to appoint a judge as case manager of these nine files.

[14] I am prepared to order the transfer of the files that are still in Pictou to the Prothonotary's office in Halifax and to give them a Halifax file number.

[15] [Discussion with Counsel]

[16] I will order costs payable in sixty days to the defendants, Keybase and Global, in the amount of fifteen hundred dollars jointly and severally by all plaintiffs. And I order costs in the amount of a thousand dollars with the same deadline and joint and several liability to Mr. Pierce's client, Dundee.

J.