SUPREME COURT OF NOVA SCOTIA

Citation: *Crooks v CIBC World Markets Inc.*, 2017 NSSC 75

Date: 20170320
Docket: Hfx. No. 322441
Registry: Halifax

Between:

Gayle Crooks, Archie Gillis and Karen McGrath

Plaintiffs

v.

CIBC World Markets Inc./Marches Mondiaux CIBC Inc.

carrying on business as CIBC Wood Gundy

Defendant

Decision re: Decertification and Costs

Judge:	The Honourable Justice Patrick Duncan	
Heard:	June 8, and August 5, 2016 in Halifax, Nova Scotia	
Final Written Submissions:	September 23, 2016	
Counsel:	George W. MacDonald Q.C. Jane O'Neill Q.C.	for the plaintiffs
	John Keith Q.C. Jack Townsend	for the defendant

By the Court:

Background

[1] After my decision decertifying this proceeding (reported as *Crooks v. CIBC World Markets Inc.*, 2016 NSSC 145) the parties were unable to agree on the degree to which this proceeding continues to be subject to the statutory regime set out in the **Class Proceedings Act** S.N.S. 2007, c. 28 (CPA). They also cannot agree on the disposition of costs following upon the determination of that motion.

[2] For ease of reference, this is from the "Conclusion" of that decision:

> 163 For the reasons set out herein I conclude that an Order will issue that sets out the defendant's admissions of liability to the members of the class for breach of contract, negligence and negligent misrepresentation. The benefit of this finding enures to the benefit of all class members. The relevant Common Issues to these admissions are (a), (b), (d), (e) and (f).
>
> 164 I conclude that the Certification Order made by Moir J. and dated July 13, 2011, will be amended to delete Common Issues (c), (g), (h), (j), (k), (n) and (p).
>
> 165 I have not been asked to delete the remaining Common issues, but for reasons set out herein, I have concluded that they are capable, and generally better addressed on a case by case basis having regard to my findings that:
>
> (i) the only outstanding contested cause of action, breach of fiduciary duty, must be tried on a case by case basis;
>
> (ii) that causation must be tried on a case by case basis; and
>
> (iii) that the assessment of the investors' damage claims must be tried on a case by case basis.
>
> …
>
> 168 The court has always understood that further resources would be committed to the ultimate resolution of the investors' claims. I am satisfied that the elimination of most of the liability questions offsets the addition of some issues to the case by case hearings that were always known to be required.
>
> 169 The admissions of liability provide the class members with a favorable outcome while saving the time and cost that the members of the class would have incurred in trying those issues.
>
> 170 ….However, I do not see further benefit to the litigants of continuing this action as a class proceeding.
>
> 171 …

> 172 It has always been understood by the court and the litigants that the damages hearing would need to be conducted on a case by case basis. Having regard to the determination that the breach of fiduciary duty allegation and causation must also be tried on a case by case basis, I have concluded that the questions of fact and of law that remain common to the class members no longer predominate over any questions affecting only individual members of the class.
>
> 173 At the time of the certification the defendant, while having paid millions of dollars to the investors, had not admitted liability. Some behaviour modification is evidenced by their admissions. It remains to be seen whether the compensation paid "...was made more for business purposes than to respond to liability." see, Certification Decision at para. 47. The remaining litigation steps will identify and compensate where the court finds it to be appropriate. Awards of damages, if ordered against the defendant in the individual cases, can further the goal of behaviour modification.
>
> 174 The defendant has satisfied its burden, on the basis of newly discovered evidence, post certification developments in the course of the litigation and post certification changes to the law, to establish that the requirements of section 7 of the **Class Proceedings Act** are no longer satisfied. Having examined the common and individual issues and taking into account that which each class member must prove to demonstrate liability and damages, I conclude that a class action is no longer the preferable procedure for proceeding with these claims.
>
> 175 I will sign an order to give effect to the admissions of liability by the defendant, and to decertify the proceeding.

[3] The use of the phrase "admissions of liability", while well understood by the parties, is not the most accurate way to describe what was admitted to by the defendant. By a separately filed Addendum to that decision references to the defendant's admissions of "liability" are explained to be admissions in relation to five common issues. This is consistent with paragraph 43 of the decision which sets out that the defendant "Admitted; answered in the affirmative" the following common issue questions:

> a) Did CIBC owe the class members a duty of care to provide them with a correct margin calculation in their margin accounts?
>
> b) Did CIBC breach the standard of care by failing to provide class members with a correct margin calculation in their margin accounts?
>
> …
>
> d) Was it an implied term of the class members' investment contracts with CIBC that they would be provided with correctly calculated margin account information?

> e) Did CIBC breach the class members' investment contracts by failing to maintain proper margin account information?
>
> f) Did CIBC negligently misrepresent that the class members' margin account calculation was correct?

[4] In making these admissions, the defendant did not admit that, nor was it my intention to suggest that, the plaintiffs are entitled to any form of relief claimed. My conclusion was and continues to be that the admissions eliminated a significant legal dispute as between the parties. Combined with other factors cited by me, I concluded that a class proceeding was no longer the preferable procedure for proceeding with these claims.

Issues

[5] While this dispute arises from a disagreement over the form of order that should follow the decertification motion, the positions of the parties diverge on two fundamental questions :

1. The degree to which the provisions of the **Class Proceedings Act** apply to the continuation of the proceeding; and

2. Which party is entitled to costs and on what basis?

Positions of the Parties

[6] The plaintiffs submit they have been successful in the common issues phase of the proceeding and that the court should now move to the second phase employing the provisions of sections 23, 28, 30 and 31 of the **Class Proceedings Act**. The plaintiffs say that these claims cannot proceed as individual actions or applications as it would be inefficient, costly and inconsistent with the goals of a class proceeding. In their view, the provisions of the **Class Proceedings Act** permit the continued application of those procedures by which such problems are resolved.

[7] The plaintiffs also submit that they are entitled to costs as they were successful in gaining the defendant’s admissions to important common issue questions. Therefore, the plaintiffs are said to be entitled to costs on the motion as this is the end of the first phase of the proceeding.

[8] As to the path forward, the defendant seeks an order that:

- Sets out its' admissions and that they enure to the benefit of any class member who subsequently brings action or an application against the defendant;
- Deletes certain common issues;
- Declares the proceeding decertified;
- Directs the parties to meet to discuss the way the case will proceed;
- Directs non-representative plaintiff class members who wish to proceed with claims to commence an Application under **Civil Procedure Rule** 4 or an action under **Civil Procedure Rule** 5, or by such other procedure as the parties may agree to;
- Notice be sent out to the class members in a form attached to the draft order;
- The parties seek agreement on costs and if necessary make submissions to the court on the question.

[9] In the defendant's submissions, the **Class Proceedings Act** have no further application once this order is complied with.

[10] As to costs, the defendant says that it brought the motion to decertify and that its admissions were evidence in that motion. The motion was successful and so it is entitled to its costs.

Analysis

*What role does the **Class Proceedings Act** play in the future conduct of this claim?*

[11] For the reasons set out in *CIBC Wood Gundy v. Matheson*, 2015 NSCA 22 which informed part of my decision, I concluded that to be successful every claimant who is a class member is required to lead that evidence necessary to prove all the elements of the claim for breach of fiduciary duty including causation and damages. The claimants are also required to adduce evidence to prove causation and damages in relation to the other pleaded causes of action.

[12] The individual nature of each class member's claim is described, in part, in *Matheson*. The court held that the plaintiffs had to adduce evidence of the way the

"margin misstatement caused them to alter their investment strategy". The Mathesons, to succeed, had the burden of proving:

1. how the misstatement caused them to make any particular transaction or take (or not take) any specific course of action with their investments. see, para. 49; and

2. that those actions in turn caused compensable damages.

[13] The failure to provide evidence to meet the plaintiffs' burden resulted in the court concluding that they had failed to prove causation, and the application was dismissed. *see*, paras. 67 and 73.

[14] Without oversimplifying the multiplicity of issues that arise in these claims, it is sufficient for these purposes to say that each class member will have a different story to tell that is unique as to what their investment goals were at the time, their investment strategy for accomplishing those goals and how that was carried out in relation to their individual investment portfolio; and, ultimately, whether they incurred compensable damages that arose from the misstatement of margin. A common issues trial cannot resolve the differing facts that will be found in relation to each claimant.

[15] The present case may be distinguished from *Lundy v. Via Rail* 2015 ONSC 1879, cited by the plaintiffs in support of their position that the **Class Proceedings Act** continues to guide the conduct of the claim. In a subsequent decision reported at *Lundy v. Via Rail* 2015 ONSC 7063 the court stated that the "Defendants have admitted liability, and only the idiosyncratic issue of the quantum of damages remains to be determined." (see, at para. 1). It is self-evident that in such a case the **Class Proceedings Act** would continue to guide the procedure for the individual issues phase of the class action.

[16] The later decision reported as *Lundy v. Via Rail* 2016 ONSC 425 set out the "Individual Issues Litigation Plan" intended to resolve the entitlement, quantum and distribution of damages to the class members. That plan called upon the defendant to submit "all-inclusive offers for the Class Member and Family Class Member claims". Where the parties could not agree on a settlement, the claims were broken out into three categories by the amount claimed. The group claiming under $50,000 would be decided by a Superior Court judge based on a written record. The next tier permitted a more fulsome discovery process and would follow the **Ontario Civil Procedure Rules** for summary judgement (which I note are not

the same as in the Nova Scotia Rules). The disposition of the highest claim bracket was ordered to "…continue as a trial of an issue in accordance with the Rules of Civil Procedure, including the attendant rights for discovery, delivery of expert reports and appeal rights."

[17] The underlying premise in *Lundy* is that most, if not all, of the class members were entitled to damages arising from the admissions of liability made by the defendant. The Litigation Plan safeguarded the rights of the defendant to resist claims from those certain individuals who were not entitled to damages or not entitled to as much as they claimed. That is not the case in this matter wherein the plaintiffs have not proved an entitlement to any of the remedies claimed in their Statement of Claim.

[18] The plaintiffs submit that the future conduct of this proceeding continues to be subject to the provisions of the **Class Proceedings Act** and refers the court to section 23, (Notice of determination of common issues), section 28 (Contents of an order respecting judgment on common issues) and Section 30 (Determination of issues affecting certain individuals). For reasons that I set out later I agree that there will need to be an order and notice to the class members setting out the disposition of the class proceeding together with future steps. I do not agree however that the authority for these steps emanates from the sections cited above.

[19] What distinguishes this case from *Lundy*, and what removes it from the application of these **Class Proceedings Act** sections, is that the plaintiffs have not proven entitlement to any of the relief claimed in the Statement of Claim. Further, the most significant issues which remain outstanding are individual to each and every member of the class, not just to "certain individuals" from within the class. Once decertified, the procedure by which the claims advance is presumptively those in the **Civil Procedure Rules**. It is interesting to note that while still administering the claims as a class proceeding, Justice Perell in *Lundy* ultimately adopted this procedure for resolution of the third tier of claims.

[20] Section 30 of the Class Proceedings Act states:

> **Determination of issues affecting certain individuals**
>
> 30 (1) Where the court determines common issues in favour of a class or subclass and determines that there are issues, other than those that may be determined under Section 35, that <u>are applicable only to certain individual class or subclass members</u>, the court may

> (a) determine those individual issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
>
> (b) appoint one or more persons, including, without limiting the generality of the foregoing, one or more independent experts, to conduct a reference into those individual issues under the Civil Procedure Rules and report back to the court; or
>
> (c) with the consent of the parties, direct that those individual issues be determined in any other manner.
>
> (2) The court may give any necessary directions relating to the procedures that shall be followed in conducting hearings, references and determinations under subsection (1).
>
> (3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the individual issues that, in the opinion of the court, is consistent with justice to the class or subclass members and the parties and, in doing so, the court may
>
> (a) dispense with any procedural step that it considers unnecessary; and
>
> (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.
>
> (4) The court shall set a reasonable time within which individual class or subclass members may make claims under this Section in respect of the individual issues.
>
> (5) A class or subclass member who fails to make a claim within the time set under subsection (4) shall not later make a claim under this Section in respect of the individual issues applicable to that member except with leave of the court.
>
> (6) The court may grant leave under subsection (5) if, in the opinion of the court,
>
> (a) there are apparent grounds for relief;
>
> (b) the delay was not caused by any fault of the person seeking the relief; and
>
> (c) the defendant would not suffer substantial prejudice if leave were granted.
>
> (7) Unless otherwise ordered by the court making a direction under clause (1)(c), a determination of issues made in accordance with that clause is deemed to be an order of the court. 2007, c. 28, s. 30.

[21] Section 30 of the **Class Proceedings Act** is relied upon to determine issues that "… are applicable only to certain individual class or subclass members…".

The issues that are outstanding in this case apply to every class member not just "certain" individual members.

[22] Section 28 requires that "an order made in respect of a judgement on common issues of a class or subclass must…(d) specify the relief granted". Section 23(c) specifies that the Notice to the Class members must "state that class or subclass members may be entitled to individual relief". No relief has been granted at this point and it cannot be said at this point that any class member "may be entitled" to relief. Even though section 23 conditions such relief by using the word "may", there is no basis at this point to suggest that the claimants have a possible entitlement to relief. Their claims are subject to the same risks of litigation as any other matter where essential elements such as causation have not been adjudicated.

[23] In summary, my view is that section 30 (and section 31) contemplates the continuation of the proceeding as a class proceeding, which I have determined is no longer the preferable procedure for the fair and efficient resolution of the dispute. My earlier decision continues to stand for the determination that the conditions in section 7 **Class Proceedings Act** are no longer satisfied and the proceeding is decertified.

[24] Section 13(2) of the **Class Proceedings Act** provides two options to the court where it has determined that "… the conditions referred to in Section 7 … are not satisfied":

> **Where conditions for certification not satisfied after certification**
>
> 13 (1) Without limiting subsection 11(4), where at any time after a certification order is made under this Part it appears to the court that the conditions referred to in Section 7 or subsection 9(1) are not satisfied, the court may amend the certification order, decertify the proceeding as a class proceeding or make any other order it considers appropriate.
>
> (2) Where the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties and may make any order referred to in Section 12 in relation to each of those proceedings. 2007, c. 28, s. 13.

[25] So, the first question is whether the claim(s) can proceed? The answer is yes - the claims of class members are still litigable, but not as a class proceeding.

[26] The next question is whether the class members' individual claims should proceed as one proceeding or more proceedings. Counsel for the defendant has submitted that it is to be resolved by individual proceedings, a position that the plaintiffs strenuously object to. The plaintiffs say such a process would result in a large number of separate claims in which there would be a potential for extensive repetition of evidence and an overwhelming number of pretrial procedures engaging discoveries and documentary evidence.

[27] The remedies provided in section 12, incorporated by reference in section 13(2), are the same as if the claim had not been certified as a class proceeding. It states, in part:

> 12 … the court may
>
> (a) order the addition, deletion or substitution of parties;
>
> (b) order the amendment of the pleadings or the notice of application; and
>
> (c) make any other order it considers appropriate. 2007, c. 28, s. 12.

[28] Such orders are in the discretion of the court. That discretion must be exercised judicially. At this point I take no position on the preferable course and direct counsel to consider this question to determine if they can agree on a litigation plan. If not, then I will seek that the parties make further representations on this question to determine the best course of proceeding. Having said that, I offer some observations in response to the positions advocated to this point.

[29] In response to the plaintiffs' concerns - it may be that if the matter were to continue as one proceeding, then the class members could seek to be added as individual plaintiffs. The pleadings can be amended to reflect the individual circumstances of their respective claims. The applicable law appears to be no longer in issue. The admissions made by the defendant would follow this amended claim with the additional plaintiffs. A single trial could be held, with each plaintiff leading evidence that spoke to their individual issues. Such a trial would likely have some efficiencies since there would be common evidence on some matters, which though not determinative of any individual claim, could shorten the trial. It may be that certain agreements of fact can be reached.

[30] An alternative is that each class member would be permitted to initiate an individual action or application in court. In this scenario, at a minimum, an order would be necessary to ensure the enforceability of the defendant's admissions to the common issues in each, individual proceeding. The use of Applications in

Court would shorten the amount of court time needed. Agreements of fact may be reached and applied to each claim proceeding. There may be other directions or orders that can be taken to make the proceedings more efficient.

[31] The plaintiffs argue that "the court will be left with over 100 separate actions" and describe those factors which counsel views as inefficient and cost ineffective. With respect, that is a consequence that I was required to and did consider as part of my review of the factors contained in section 7 of the **Class Proceedings Act**. I re-iterate that it was always understood by the parties that at least damages would be subject to individual assessments. So, if there are over 100 claimants then the court was, in my view, committed to having over 100 individual claims assessed. Considering the decision in *Matheson*, and other factors which I have set out, those individual claims must also be assessed for proof of all element of a breach of fiduciary duty and for proof of causation and damages in relation to other pleaded causes.

[32] This proceeding will continue as a trial of an issue in accordance with the provisions of the **Civil Procedure Rules**. It is subject to the exercise of discretion necessary for the most effective and cost efficient manner to do justice as among the parties. **Civil Procedure Rules 1.0** (Purpose) and **2.03** (General Judicial Discretions) are certainly relevant to the management of the proceeding. Other provisions such as **Civil Procedure Rule** 37 (Consolidation and Separation) may be relevant to the future conduct of the proceeding.

[33] Does the **Class Proceedings Act** play any role in managing these claims? I believe it does, but not in the way argued by the plaintiffs.

[34] As this proceeding moves forward, I will consider the provisions of sections 23 and 30 of the **Class Proceedings Act** where they offer useful guidance in what might be considered appropriate to the continuation of the proceedings in accordance with the discretion provided the court by sections 12(c) and 13(2) of the **Class Proceedings Act**. So, while **Class Proceedings Act** sections 23, 28, 30 and 31 have no application to the continuation of the proceedings, the procedural steps set out in some of those sections, including the formation of a further litigation plan, may offer guidance in framing the contents of future orders that are made relying on the **Civil Procedure Rules** and the discretion that section 12(c) of the **Class Proceedings Act** provides.

Costs

Which party is entitled to costs and on what basis?

[35] The defendant's motion to decertify the class proceeding was successful in the face of the plaintiffs' opposition. Costs would typically follow that success, and they will. The defendant is entitled to its costs on the motion.

[36] The plaintiffs submit that they are entitled to costs on the close of the common issues phase of the proceeding. They argue that the admissions by the defendant represent success for the plaintiffs. I agree that in terms of the overall purposes of the certification there was a measure of success enjoyed by the class during the lifetime of the certified proceeding. The defendant contested all common issues for a lengthy period, eventually making admissions to five elements of the claims that are important to the continuation of the plaintiffs' action for damages. Had those admissions been made an earlier stage in the proceeding it may very well have saved costs that each of the parties incurred up to the time of those admissions.

[37] As such, the plaintiffs are entitled to costs to reflect partial success in the proceeding. The plaintiffs' costs, however, should not presume success in the overall proceeding as the class has not established entitlement to any of the remedies claimed.

[38] Section 40 of the **Class Proceedings Act** provides for costs:

> 40 (1) With respect to any proceeding or other matter under this Act, costs may be awarded in accordance with the Civil Procedure Rules.
>
> (2) When awarding costs pursuant to subsection (1), the court may consider whether
>
> (a) the class proceeding was a test case, raised a novel point of law or involved a matter of public interest; and
>
> (b) a cost award would further judicial economy, access to justice or behaviour modification.
>
> (3) The court may apportion costs against various parties in accordance with the extent of the parties' liability.
>
> (4) A class member, other than a representative party, is not liable for costs except with respect to the determination of the class member's own individual claims. 2007, c. 28, s. 40

[39] If the parties are unable to agree on costs I will receive their submissions on a timetable to be set by them and in the manner they request.

Form of Order

[40] The form of order will be based upon the defendant's draft order identified by it as document number 1890232. The recitals and paragraphs 1, 2, 3 and 4 will remain as drafted.

[41] Paragraph 5 should now provide that:

> 5. Pursuant to section 13(2) of the **Class Proceedings Act** the court grants permission for the proceeding to continue as one or more proceedings between members of the class and the defendant. The parties shall convene to determine if they can reach agreement on the manner in which the present action will proceed. If no agreement can be reached, the Court shall hear the representative plaintiffs and the defendant and make an order accordingly;

[42] Draft paragraph 6 provided for a Notice to the Class Members. Such a notice will be required but the contents cannot be finalized until the determination is made as to whether the proceeding will move forward as one or more proceedings. Subject to further representations of the parties, my view is that the draft Notice attached as Schedule "B" is satisfactory in all but three respects:

1. It does not refer to the breach of fiduciary duty pleading;

2. The paragraph at page 3 citing the need for class member to make claims "on an individualized basis, in the manner set out below", is not determined yet;

3. The "Conclusion and Next Steps" are also outstanding at this time and to be determined.

[43] If the parties cannot agree on costs, having regard to my conclusions in this decision, then costs will be subject to further submissions as to quantum and terms of payment, having regard to the factors set out in section 40 of the **Class Proceedings Act** and the provisions of **Civil Procedure Rule** 77, in particular **Civil Procedure Rule** 77.01 and 77.03(4).

[44] Order accordingly.

Duncan, J.