# COURT OF APPEAL FOR ONTARIO

CITATION: Fantl v. Transamerica Life Canada, 2016 ONCA 633
DATE:.20160822
DOCKET: C61284



Strathy C.J.O., Blair and Lauwers JJ.A.

BETWEEN

Joseph Fantl

Plaintiff/Respondent

and

Transamerica Life Canada

Defendant/Appellant

Mary Jane Stitt and Doug McLeod, for the appellant

David F. O'Connor and J. Adam Dewar, for the respondent

Heard: May 11, 2016

On appeal from the order of the Divisional Court (H. Sachs, D.L. Corbett and Gilmore JJ.), dated March 9, 2015, with reasons reported at 2015 ONSC 1367, setting aside in part the certification order of Justice P. Perell of the Superior Court of Justice, dated April 18, 2013, with reasons reported at 2013 ONSC 2298.

Strathy C.J.O.:

## A. INTRODUCTION

[1] The issue on this appeal is whether a class action for negligent misrepresentation is the preferable procedure for the resolution of the class members' claims.

[2] The certification judge held that it was not, because the individual issues of reliance, causation and damages would "overwhelm or subsume" the common issues. The Divisional Court allowed the appeal, noting that the certification judge did not have the benefit of the Supreme Court of Canada's decision in *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949.

[3] For the reasons that follow, I would dismiss the appeal.

**B. THE FACTS**

[4] The proposed class is composed of investors in Transamerica's Can-Am Fund, an investment vehicle offered under insurance contracts sold by Transamerica between October 1992 and March 2001. It was a "synthetic" fund, similar to a mutual fund and designed to replicate the performance of the S&P 500.

[5] The respondent's class action encompasses 53 different insurance contracts. Five of these contained an express statement that the fund would "on a best efforts basis replicate the performance of the S&P 500 Total Return Index."

[6] The other 48 contracts did not contain this express statement. However, beginning in 1994, every investor in the Can-Am Fund received an information folder containing a statement that the goal of the fund was to replicate, on a "best efforts" basis, the performance of the S&P 500 Total Return Index.

[7] The information folder was provided pursuant to regulations under the Ontario *Insurance Act,* R.S.O. 1990, c. I.8, which required that investors receive a disclosure document before investing in a segregated fund like the Can-Am Fund. That document, referred to as an "information folder," is required to disclose the fund's investment policy and objectives. Investors are required to acknowledge receipt of the information folder.

[8] The respondent's negligent misrepresentation claim arises from the "best efforts" statement in the information folder. He says this representation was untrue.

## C. DECISIONS BELOW

[9] I will give a brief overview of the reasons in the courts below. Further detail will be added in the Analysis section.

### (1) The certification judge

[10] The certification judge certified the plaintiff's action for breach of contract based on the five insurance contracts that contained an express "best efforts" clause. He did not certify the negligent misrepresentation claim in relation to the statements in the information folders provided to investors in the other 48 contracts.

[11] He found that two, or possibly three, of the five constituent elements of the tort of misrepresentation could be common issues: (a) the existence of a duty of

care; (b) whether the representation was untrue, inaccurate or misleading; and (c) whether the misrepresentation was made negligently. This left issues of reliance and damages to be decided at individual trials – issues that he regarded as "critical, difficult, and contentious."

[12] He concluded that these individual issues "overwhelmed or subsumed" the common issues, and that resolving the common issues would "mark just the beginning of the process leading to a final disposition of the claims of class members". For this reason, he said, a class action was not the preferable procedure for the negligent misrepresentation claims. Moreover, this was not a case in which the policyholders' claims were "so small that access to justice would not be available absent a class action."

**(2) The Divisional Court**

[13] The Divisional Court noted that although a certification judge's decision on preferable procedure is normally entitled to deference, the judge here did not have the benefit of the approach to the preferability analysis set out by the Supreme Court in *Fischer*.

[14] Applying that analysis, the Divisional Court held that a class proceeding was a fair, efficient and manageable method of advancing the claim and the only reasonable way to remove the economic barriers to access to justice. It also found that the certification judge had overstated the value of the plaintiff's claim

in coming to his conclusion that it was economically viable as a stand-alone claim. It was not viable and there was no reasonable alternative.

[15] The Divisional Court recognized that *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. However, as the certification judge noted, two, and perhaps even three, of the five elements of the tort of negligent misrepresentation could be dealt with at a common issues trial.

[16] Moreover, contrary to the certification judge's finding that the common issues to be tried in the certified breach of contract claim would not assist the prosecution of the tort claim, the evidence on the breach of contract common issue would likely overlap with the evidence in the tort claim. That evidence would examine how the Can-Am Fund was invested and managed and how it ought to have been managed to replicate the performance of the S&P 500.

[17] While the duty of care issue might not be particularly contentious, determining whether the representation was false and whether Transamerica was negligent would require expensive and complex expert evidence and it would be efficient to address these issues in a class action.

[18] The remaining elements of the tort of misrepresentation – reliance and damages – were individual issues. The Divisional Court noted that there have been cases in which such reliance-based claims have not been certified due to

the unmanageability of individual issues: see *e.g.*: *Musicians' Pension Fund of Canada (Trustees of) v. Kinross Gold Corporation*, 2014 ONCA 901, 61 C.P.C. (7th) 1; *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, [2012] O.J. No. 3072, rev'd on other grounds, 2014 ONCA 90, aff'd, 2015 SCC 60.

[19] On the other hand, it noted, claims involving a single representation, a uniform set of representations, or even separate representations having a common import have been certified, notwithstanding individual issues of reliance and damages, citing: *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, leave to appeal to Div. Ct. refused, 2012 ONSC 6101 (Div. Ct.); *Ramdath v. George Brown College of Applied Arts and Technology*, 2010 ONSC 2019, 93 C.P.C. (6th) 106, at para. 103; *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.), 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.); and *Silver v. IMAX Corp.*, [2009] O.J. No. 5585 (S.C.), leave to appeal to Div. Ct. refused, 2011 ONSC 1035 (Div. Ct.)[1].

[20] Here, there was a single uniform representation, contained in a statutorily-mandated disclosure document, which was given to each class member and which each acknowledged receiving.

[21] The Divisional Court considered, at para. 46, that the individual issues of reliance and damages might be capable of resolution through "fairly straightforward mechanisms." While reliance would be an individual issue, a class member would not need to prove that the representation was the only factor that induced the investment, but simply that they relied on the representation (para. 44, referring to *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (C.A.) at para. 78, leave to appeal to SCC refused, [2000] S.C.C.A. No. 96).

## D. SUBMISSIONS OF THE PARTIES

[22] The appellant submits that *Fischer* does not eliminate *Hollick's* requirement that the proposed class action be a fair, efficient and manageable method of resolving class members' claims. It says that this court's decision in *Kinross* illustrates that a class proceeding based on common law

[1] In *Silver*, van Rensburg J. (as she then was) rendered a separate decision concerning leave to pursue a claim for secondary market misrepresentation against the defendant. This decision was appealed to the Court of Appeal and thereafter to the Supreme Court of Canada: *Silver v. IMAX Corp.*, 2012 ONSC 4881, aff'd, 2014 ONCA 90, aff'd, 2015 SCC 60.

misrepresentation is unsuitable for certification because individual issues of reliance, causation, mitigation and damages make it unmanageable. As a result, it simply cannot promote judicial economy and efficiency.

[23] The respondent argues, as he did in the Divisional Court, that deference is not owed to the decision of the certification judge as he did not have the benefit of *Fischer*, which refocused the preferable procedure analysis on access to justice. He says that the presence of individual issues does not preclude certification, for the reasons set out by the Divisional Court.

## E. ANALYSIS

[24] I would dismiss the appeal, substantially for the reasons given by the Divisional Court.

[25] The Divisional Court noted that a certification judge's decision on preferable procedure attracts deference and a reviewing court should intervene only where the judge has made a palpable and overriding error of fact or has erred in principle: *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (C.A). Here, the effect of *Fischer*, released subsequent to the certification judge's decision, was to reduce the deference that would normally be given to the certification analysis. This is consistent with *Kinross*, at para. 107, where this court considered that the failure of the certification analysis to comport with *Fischer* was a factor that

reduced the deference owned to the certification judge and permitted the court to conduct its own analysis.

[26] In *Fischer*, Cromwell J. emphasized that the preferability analysis is a comparative one that considers whether the proposed class action will achieve the goals of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, as compared to other means of resolving the claim. This requires a consideration of whether the process is fair and will provide claimants with a just and effective remedy. The remedy will not be just and effective if, at the end of the day, claimants remain faced with the same economic and practical hurdles they faced at the outset of the proceeding.

[27] *Fischer* requires us to consider (a) the barriers to access to justice; (b) the potential of a class action to address those barriers; and (c) the alternatives to a class action, including the extent to which the alternatives address the relevant barriers and how the two proceedings compare.

[28] As Cromwell J. noted, the most common barrier to access to justice is an economic one. That is the case here.

[29] The motion judge concluded that the amount of damages claimed at the individual issues trial could be substantial. He suggested that Mr. Fantl had the alternative of commencing an action in the Superior Court and that efficiencies

might be obtained by joinder of plaintiffs. He made reference to the fact that Mr. Fantl had made a total investment of around $100,000.

[30] As the Divisional Court pointed out, however, Mr. Fantl invested only a part of this amount in the Can-Am Fund. His investments in the Can-Am Fund during the material time ranged in value between approximately $27,000 and $52,000. His monetary damages, calculated on the difference between what he earned on those investments and what he would have earned had the representation not been made, would have been a fraction of his investment.

[31] I agree with the Divisional Court's conclusion, at para. 32, that Mr. Fantl's claim could not reasonably be viewed as economically viable to litigate in the Superior Court. The cost of expert evidence to establish that the representation was untrue or misleading, and that the misrepresentation was made negligently, would be out of all proportion to the amount at issue. That cost would be a significant barrier to access to justice. That barrier would not be addressed by joinder, which is not a practical means of bringing access to justice to a class of thousands. A class proceeding, on the other hand, has the potential to address this economic barrier by distributing the costs over thousands of class members, rather than one or even a few.

[32] The real issue on this appeal was not at issue in *Fischer*, but was in *Kinross* – whether a class action would be a fair, efficient and manageable

proceeding, having regard to the common issues in the context of the action as a whole and the individual issues that would remain after the common issues are resolved.

[33] The appellant submits that the Divisional Court's decision is in direct conflict with this court's decision in *Kinross*. According to the appellant, *Kinross* establishes that common law negligent misrepresentation claims in investor class actions are inherently unsuitable for certification because the need for numerous individual inquiries undercuts the goal of judicial economy and overwhelms the resolution of the common issues, producing an inefficient and unmanageable class proceeding.

[34] *Kinross* involved claims under the *Securities Act*, R.S.O. 1990, c. S.5, for secondary market misrepresentation and common law claims for negligent misrepresentation. The motion judge denied leave to proceed with the statutory claims and declined to certify both the statutory and common law claims.

[35] This court found that the motion judge had erred in refusing to certify the common law claims solely on the basis of the denial of leave for the statutory claims. While this court found that the motion judge's preferability analysis did not comport with *Fischer*, it found that the proposed class action did not meet the preferable procedure criterion because the individual issues of reliance, causation and damages rendered the common law claims unsuitable for

certification. It held, at para. 127, that “a class proceeding would not represent a fair, efficient and manageable procedure that is preferable to any alternative method of resolving the common law claims.”

[36] *Kinross* is distinguishable for several reasons. *First*, as I have noted, the action was for both the statutory remedy for misrepresentation in the secondary securities market and for common law misrepresentation. It has often been noted that securities cases frequently present difficulties in class actions, hence the statutory remedy, which obviates the need to prove reliance: see *Green v. CIBC* at paras. 595, 610-611. This court noted in *Kinross* that proof of reliance, causation and damages would pose particular difficulties, making it necessary to answer numerous investor-specific questions related to multiple representations, investors’ sophistication and investment advice, dates of acquisition and prices. This court considered that the host of individual inquiries would make the common law claims unsuitable for certification.

[37] Here, in contrast, there was a single common written representation made in the English language materials. Moreover, every class member acknowledged receiving it. This substantially obviates the need for individual inquiries into whether the alleged misstatement was received by class members.

[38] *Second*, in *Kinross* there had been a judicial determination that the statutory misrepresentation claims, which rested on the same foundation as the common law claims, had no reasonable prospect of success at trial. This favoured the conclusion that a class action was not the preferable procedure for advancing the common law claims. That circumstance does not apply here.

[39] *Third*, in this case some of the necessary heavy lifting on the misrepresentation common issues will be shared with the certified breach of contract common issues. This will promote judicial economy and will avoid a multiplicity of proceedings. As the Divisional Court observed, at para. 41, referring to this court's decision in *Carom v. Bre-Ex Minerals Ltd.*, "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."

[40] *Fourth*, the resolution of the common issues of duty of care, truth or falsity of the representation and negligence would go a long way towards the determination of the appellant's liability and would significantly advance the claim of every class member.

[41] If the common issues are resolved in favour of the defendant, that will be the end of the matter. If they are resolved in favour of the class, a class proceeding can provide a framework for the resolution of the individual issues. It

is realistic to expect that having tried the common issues the trial judge will have a full appreciation of the individual issues and will be well equipped to devise a procedure for the resolution of those issues. Section 25 of the *CPA* gives the judge authority to craft fair, inexpensive and efficient procedures in order to do so. This is ancillary to the broad discretion conferred on the court under s. 12 to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination".

[42] While damages might be a more complex individual issue, s. 6.1 of the *CPA* expressly provides that the need for individual assessments of damages is not, in itself, a bar to certification. See *Brown v. Canadian Imperial Bank of Commerce*, 2012 ONSC 2377, at para. 195, aff'd 2013 1284 (Div. Ct.), aff'd, 2014 ONCA 677.

[43] In my view, therefore, a class action in this proceeding has the potential to address the barriers to access to justice and can promote the resolution of claims that cannot be efficiently litigated through individual proceedings or by alternatives such as joinder.

[44] Although class actions have been with us in Ontario for almost 25 years, there have, at most recent report, been less than 20 common issues trials: see Jon Foreman & Genevieve Meisenheimer, "The Evolution of the Class Action Trial in Ontario" (2014) 4 Western Journal of Legal Studies. Few of these have

resulted in individual issues trials. If class actions are to deliver on their promise of access to justice it is perhaps time to test some of the assumptions made about the "manageability" of the individual issues stage of a class action. This appears to be an ideal case in which to do so.

**French language issue**

[45] The appellant raised for the first time an argument based on the difference between the French and English versions of the information folder. Instead of the "best efforts" language, one French version states, "afin de reproduire le plus précisément possible la performance de l'indice de rendement global S&P 500." Another French version uses the wording "afin d'afficher globalement, le plus …".

[46] The appellant claims that the phrase "best efforts" is a concept unique to common law jurisprudence that has a distinct meaning and specific legal implications. He says that the result is that the proposed class, which includes those who received French and English folders, is overbroad.

[47] This issue was not raised in the courts below and there is no evidentiary basis for it in the record. For this reason, I would not consider it. It can be addressed, if necessary, in the ordinary course of case management, through the creation of a sub-class and sub-class common issues.

## F. ORDER

[48] For these reasons, I would dismiss the appeal, with costs of the leave motion and the appeal payable to the respondent in the agreed amount of $65,000, inclusive of disbursements and all applicable taxes.



Released: “GRS” “AUG 22 2016”

“G.R. Strathy C.J.O.”
“I agree R.A. Blair J.A.”
“I agree P. Lauwers J.A.”