IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Watson v. Bank of America Corporation,* 2012 BCSC 146

Date: 20120131
Docket: S112003
Registry: Vancouver

Between:

Mary Watson

Plaintiff

And

Bank of America Corporation, BMO Financial Group, Bank of Nova Scotia, Canadian Imperial Bank of Commerce, Capital One Financial Corporation, Citigroup Inc., Federation des caisses Desjardins du Quebec, MasterCard International Incorporated, National Bank of Canada Inc., Royal Bank of Canada, Toronto-Dominion Bank, and Visa Canada Corporation

Defendants

Before: The Honourable Chief Justice Bauman

Reasons for Decision

Re: Interlocutory Application No. 1

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Place and Date of Hearing:	Vancouver, B.C. January 10, 2012
Place and Date of Judgment:	Vancouver, B.C. January 31, 2012

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I.

[1] In this action under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (*CPA*), the defendants bring this application for leave to bring their motion to strike the notice of civil claim before the plaintiff's application to certify the proceeding as a class action is heard. The defendants also bring application for a so-called "pause" order for reasons which I will detail below.

[2] The strike motion is advanced under Rule 9-5 of the *Supreme Court Civil Rules* B.C. Reg. 168/2009 on these grounds:

(a) that the notice of civil claim discloses no reasonable claim; and

(b) in the alternative, the pleading is scandalous, frivolous, vexatious and/or embarrassing.

[3] We have then what has become a typical struggle in these matters: a plaintiff who wishes to advance, somewhat expeditiously, to the certification hearing, and defendants who wish to avoid the expense (and drama) of that reckoning by advancing an application which they submit will, if successful, resolve all or much of the dispute.

II.

[4] The putative classes are the "Visa Class Members" and the "MasterCard Class Members".

[5] The Visa Class Members are described so:

> ... members of a class (the "Visa Class Members") of merchants consisting of the plaintiff and all Canadian resident persons who, during the period commencing at least as early as March 23, 2001 and continuing through to the present (the "Class Period"), accepted payments for the supply of goods and services by way of Visa credit cards pursuant to the terms of merchant agreements, or such other class definition or class period as the Court may ultimately decide on the motion for certification.

[6] The MasterCard Class Members are similarly described.

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[7] The notice of civil claim describes the credit card networks of both Visa and MasterCard. These networks facilitate credit and debit card transactions. Each credit card network involves contracts with (1) issuing banks that are authorized by the defendants to issue credit cards to consumers bearing the trademarks Visa and/or MasterCard (“Issuing Banks”), and (2) acquiring financial institutions that function as payment processors to merchants (“Acquirers”).

[8] Paragraphs 23, 24 and 25 of the notice of civil claim describe the plaintiff’s version of the overall arrangement between merchants and the credit card companies (I do not mean to suggest that, in fact, that relationship is direct, as that is hotly contested):

> In order to accept payments by Visa or MasterCard credit cards, merchants must enter into agreements with Acquirers. These agreements include standard terms and conditions imposed by the Issuing Banks and Visa and MasterCard through their respective agreements with the Acquirers. These agreements include the terms of the Visa International Operating Regulations (the "Visa Rules") and the MasterCard International MasterCard Rules (the "MasterCard Rules").
>
> Every time a customer uses a Visa or MasterCard credit card to pay a merchant for a good or service, that merchant must pay a fee, commonly referred to as a "Merchant Discount Fee". The Merchant Discount Fee is calculated as a percentage of the sale price of the good or service supplied. The Merchant Discount Fee is the difference between the price a merchant charges for a good or service and the amount that is paid to the merchant by the Acquirer. In 2009, merchants in Canada paid approximately $5 billion in Merchant Discount Fees.
>
> The Merchant Discount Fee is divided into three parts: the "Interchange Fee" paid to the Issuing Bank associated with the customer's particular Visa or MasterCard credit card, the "Service Fee" retained by the Acquirer and the "Network Fee" paid to either Visa or MasterCard. The Interchange Fee is typically 80% of the Merchant Discount Fee.

[9] I should note that the plaintiff has put before the Court proposed amendments to the notice of civil claim which the defendants will oppose. For now, it is sufficient to quote from the original notice of civil claim.

[10] The original pleading goes on to allege that the rules set by the credit card companies, in effect, impose significant restrictions on the terms upon which

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Acquirers supply credit card network services to merchants under the merchant agreements (the “Merchant Restraints”).

[11] It is alleged that both Visa and MasterCard impose substantially the same restraints (at paras. 30 and 31 of the notice of civil claim):

> ... including the requirements that merchants must honour all credit cards of the same network (the "Honour All Cards Rule") and may not impose surcharges on purchases made using any credit card of the same network, regardless of the Merchant Discount Fee associated with use of a particular credit card (the "No Surcharge Rule").

[12] The notice of civil claim then advances the essence of the plaintiff’s cause of action alleging two conspiracies involving Visa and MasterCard, various Issuing Banks (not all defendants), and various Acquirers (including some not named as defendants). The conspiracies are alleged to involve unlawful conduct and anti-competitive agreements.

[13] In respect of the Visa conspiracy, paragraph 43 of the notice of civil claim states:

> In furtherance of the conspiracy, during the Class Period, Visa, CIBC, Desjardins, RBC, Scotiabank, and TD, their co-conspirators, and their servants and agents:
>
> (a) increased or maintained the default rates for Merchant Discount Fees in Canada, including British Columbia;
>
> (b) controlled the supply of credit card services by imposing the Visa Rules including the Merchant Restraints on merchants in Canada, including in British Columbia;
>
> (c) communicated, in person and by telephone, to discuss and fix the default rates for Merchant Discount Fees in Canada, including British Columbia;
>
> (d) exchanged information regarding the rates for Merchant Discount Fees and the volume of transactions using Visa credit cards for the purposes of monitoring and enforcing adherence to the agreed upon Merchant Restraints;

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> (e) took active steps to, and did, conceal the rates of the constituent elements of Merchant Discount Fees from all merchants; and
>
> (f) disciplined any Acquirer which failed to impose the Merchant Restraints or any merchant which failed to comply with the Merchant Restraints.

[14] Finally, it is alleged that the co-conspirators were motivated to conspire, and in each conspiracy their predominant purposes were to:

> (a) harm the plaintiff and other Class Members by requiring them to pay supracompetitive rates for Merchant Discount Fees; and
>
> (b) illegally increase their profits.

[15] The plaintiff pleads civil conspiracy, breach of s. 45 of Part VI of the *Competition Act*, R.S. 1985, c. 19 (2nd Suppl.) [as cited], and an unlawful interference with economic interests. In the alternative, the plaintiff "waives the tort" and seeks recovery under restitutionary principles.

III

[16] On this sequencing motion, the question is whether the defendants are to be permitted to have their strike motion heard and determined before the plaintiff's certification application.

[17] The law on this issue is discussed in many cases, largely from Ontario and British Columbia. There is little controversy in the jurisprudence.

[18] In this province, two recent decisions of this Court helpfully summarize the principles:

> *Hagdhust v. British Columbia Lottery Corporation*, 2011 BCSC 772, and *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture and Lands)*, 2009 BCSC 1593 [*Kwicksutaineuk*]

[19] In *Hagdhust*, Justice Savage considered sequencing a summary judgment application before the certification application. He allowed the summary judgment

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application to proceed in advance of the certification application. He drew on *Kwicksutaineuk* for many of the general principles. There, Justice Slade considered scheduling a strike motion before the certification application. He declined to do so (at paras. 73 and 74):

> [73] To permit the Province to bring an application to strike based on arguments of collateral purpose would set the stage for multiple rounds of proceedings through various levels of court.
>
> [74] Issues over whether the plaintiff has satisfied the requirements of s. 4 are not to be dealt with piecemeal in advance of the certification hearing. For the most part, the bases on which the Province seeks leave to apply to strike do just that.

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[20] Justice Slade summarized the jurisprudence as follows (at paras. 59-62):

> [59] As a general rule, the certification motion ought to be the first procedural matter to be heard and determined in an intended class proceeding: *Attis v. Canada (Minister of Health)* (2005), 75 O.R. (3d) 302 at para. 7 (S.C.J.); *Baxter v. Canada (Attorney General)*, [2005] O.J. No. 2165 (S.C.J.); *Gay v. Regional Health Authority 7*, 2009 NBQB 101 at para. 13, 343 N.B.R. (2d) 331. This rule is premised in part on the basis that the brief 90 day period for bringing a certification application in class proceedings legislation is indicative of a legislative intent that certification precede other preliminary motions. This legislative intent underpins section 2(3) of the *CPA*: *Consumers' Association et al. v. Coca-Cola Bottling Company et al.*, 2005 BCSC 1042 at paras 67-68, 46 B.C.L.R. (4th) 137.
>
> [60] Recently, Laing C.J.Q.B. canvassed the case-law on pre-certification applications in *Holland v. Canada (Agriculture, Food and Rural Revitalization)*, 2009 SKQB 334 at para. 8, distilling the following principles:
>
> > The case law is reasonably uniform that only motions which are likely to dispose of a litigation, or more efficiently address the objectives of *The Class Actions Act*, should be heard and determined prior to the certification hearing. *Vide*: *Attis v. Canada (Minister of Health)* (2005), 75 O.R. (3d) 302 (Ont. S.C.J.); *Baxter v. Canada (Attorney General)* (2005), 139 A.C.W.S. (3rd) 627 (Ont. S.C.J.); *Anderson v. Canada (Attorney General)*, 2008 NLTD 166, 301 D.L.R. (4th) 399; and *Morrison Estate v. Nova Scotia (Attorney General)*, 2009 NSSC 198, [2009] N.S.J. No. 293 (QL). Ottenbreit J. (as he then was) recently reviewed the issue of when it is appropriate to hear motions prior to the certification motion in the recent decision of *Alves v. MyTravel Canada Holidays Inc.*, 2009 SKQB 77, [2009] S.J. No. 113 (QL), and concluded the hearing of motions preliminary to the certification motion are exceptional.

> [61] Authorities from other provinces have held that a defendant must provide a “compelling reason” or demonstrate “exceptional circumstances” to receive an exemption from the general rule that the certification motion should be the first matter heard: *Alves v. MyTravel Canada Holidays Inc.*, 2009 SKQB 77 at para. 32; *Bellows v. Quik Cash Ltd.* (2004), 241 Nfld. & P.E.I.R. 224 at para. 28 (Nfld. S.C.); *Gay v. Regional Health Authority 7*, 2009 NBQB 101 at para. 18.
>
> [62] There is authority for the hearing of pre-certification motions in British Columbia in appropriate circumstances: *Nelson v. Merck*, 2006 BCSC 1549 at para. 23. As Myers J. held in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2008 BCSC 1263, no absolute rule can be laid down on when the Court will entertain and decide pre-certification motions. Each pre-certification motion must be looked at in the specific context of the case before the Court. Where the preliminary motion is time sensitive, would benefit all parties, further the objective of judicial efficiency, or have the potential to dispose of the litigation or more efficiently address the general policy objectives of class proceedings, it may be appropriately heard before the certification motion: *Baxter*, at para. 14. In the context of a jurisdictional challenge the defendants sought to bring prior to a certification hearing in *Lieberman v. Business Development Bank of Canada*, 2005 BCSC 389 at para. 17, leave to appeal ref’d 2005 BCCA 268, Davies J. provided a helpful catalogue of factors to consider when the court is asked to exercise its discretion to entertain pre-certification applications:
>
> > A non-exhaustive list of the factors that will likely have to be considered in exercising that discretion will include: the cost to the parties of participation in *Class Proceedings Act* pre-certification procedures; the strength of a defendant's jurisdictional arguments and the extent to which a preliminary application may dispose of the whole of the proceeding; the potential for delay arising from interlocutory appeals; the complexity of the evidentiary and legal issues that may arise in both the jurisdictional and certification applications; and, the interplay between the issues on both [the certification and preliminary application]. [emphasis in original]

[21] This extract cites many of the leading cases from Ontario. A more recent decision by Justice Strathy in that province is particularly helpful here: *Cannon v. Funds for Canada Foundation*, 2010 ONSC 146. There, some of the defendants wished to bring a strike motion. Justice Strathy ordered that it be heard at the same time as the certification motion.

[22] At paras. 14 and 15, the learned Judge said:

> A scheduling issue of this nature is a matter that falls within the court's discretionary jurisdiction under s. 12 of the Class Proceedings Act, 2002, S.O. 1992, c. 6 ("C.P.A."):

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> The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

Without being exhaustive, some of the factors that I consider relevant to the exercise of my discretion include:

(a) whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined;

(b) the likelihood of delays and costs associated with the motion;

(c) whether the outcome of the motion will promote settlement;

(d) whether the motion could give rise to interlocutory appeals and delays that would affect certification;

(e) the interests of economy and judicial efficiency; and

(f) generally, whether scheduling the motion in advance of certification would promote the "fair and efficient determination" of the proceeding (s. 12).

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[23] Justice Strathy was particularly concerned that the strike motion would result in delays, inefficiencies and additional costs in light of the real possibility of an appeal by the unsuccessful party. That was certainly the case in an early proceeding which I managed: *Samos Investments v. Pattison et al.*, 2001 BCSC 440. It was also the concern expressed by Patterson J. in another Ontario case: *Cecile et al. v. RetroFoam of Canada Incorporated et al.,* 2010 ONSC 3457. Justice Patterson cited Chief Justice McMurtry's admonition against "litigation by installments" in *Garland v. Consumers' Gas Co.* (2001), 57 O.R. (3d) 127 (Ont. C.A.), aff'd 2004 SCC 25:

> Before employing an instalment approach, it should be considered whether there is potential for such a procedure to result in multiple rounds of proceedings through various levels of court. Such an eventuality is to be avoided where possible, as it does little service to the parties or to the efficient administration of justice.

[24] Here, the strike motion is based largely on the premise that, at least in respect of the Interchange Fee, the putative class members are in the position of indirect "purchasers" who enjoy no cause of action against Visa, MasterCard or the Issuing Banks:

> *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2011 BCCA 187; leave to appeal granted [2011] S.C.C.A. No. 236 [*Sun-Rype*]
>
> *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2011 BCCA 186, leave to appeal granted [2011] S.C.C.A. No. 396 [*Microsoft*]

[25] The motion is further advanced on the ground that the conspiracy pleadings are hopelessly vague and lacking in particulars "and so devoid of specificity that the Defendants should not be called upon to answer...".

[26] The plaintiff joins issue on each of these essential submissions and strongly submits, in particular, that the "indirect purchaser" argument is not applicable on the facts and the law that will be developed in this proceeding.

[27] I turn to consider the factors suggested by Justice Strathy, as guiding the exercise of the Court's discretionary jurisdiction under s. 12 of the *CPA*.

[28] The application, if successful, might, indeed, substantially narrow the issues to be determined, but it would not, it seems, prevent the plaintiff from advancing the claims in respect of fees paid directly to the Acquirers.

[29] Turning to factors (b) and (d), in my view, there is a strong likelihood of delays and costs associated with this motion. There would undoubtedly be an appeal taken (or sought) by the unsuccessful parties, and I have no doubt that it would, in the defendants' case at least, lead to applications to the Supreme Court of Canada.

[30] Further, much, if not all, of the argument on the strike motion would simply duplicate the "cause of action" argument under s. 4(1)(a) of the *CPA* at the certification hearing. I agree with the plaintiff that in the circumstances of this case, there is a strong argument, based on encouraging judicial efficiency and cost containment (factor (e)), to resist effectively bifurcating the certification process by hiving off judicial treatment of one of the certification considerations to a pre-certification application.

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[31] Here, I note that the defendants place some reliance on B. Brown J.'s decision in *Dahl v. Royal Bank of Canada* (22 November 2002) Vancouver L020712, 2004 BCCA 419; 2005 BCSC 1263; 2006 BCCA 369.

[32] There, Justice Brown was considering allowing a Rule 34 application to proceed before the certification application. At para. 14 she stated:

> Further, in the circumstances of this case, the Rule 34 hearing should precede the certification hearing. If certified, the class will be very large. It is important that the action certified, of which members of the class are notified, is that which will proceed or is likely to proceed. I see no advantage in certifying an action with all that that entails only to have the scope of the action significantly reduced later by a Rule 34 hearing. In my view, it is important not only to the defendants, but to all of the potential members of the class, to know the basis of the claim. If there are very significant portions of the action which can be disposed of by way of Rule 34, that should occur, at least in these circumstances, prior to the certification.

[33] But here it is not a question of postponing the defendants' strike motion until sometime after the certification decision, and thereby potentially significantly undermining any decision favouring certification. Here, the issues on the strike motion are integral to the s. 4(1)(a) cause of action consideration under the *CPA*. These issues will be fully aired at the certification hearing itself.

[34] These various considerations lead me to conclude generally (factor (f)) that scheduling the defendants' motion in advance of the certification would not promote the "fair and efficient determination" of the proceeding.

[35] The defendants, of course, submit that the motion, if successful, would save them substantial costs in preparing for the certification application, if that was even pursued. Seeing the history of litigation proceeding by "installments", I am far from convinced that any real cost savings would accrue in litigation of this scope and importance.

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IV

[36] The defendants advance one further submission. That is, that the entire proceeding should be “paused” pending the decisions from the Supreme Court of Canada in *Sun-Rype* and *Microsoft*.

[37] At para. 43 of their submissions, the defendants explain:

> By "pause" the Defendants mean the suspension of steps in the case on the basis that those steps inevitably and unavoidably depend on law that is being challenged and is subject to review by a senior court in a directly relevant pending proceeding. The decision of the senior court - in this case the Supreme Court of Canada - will result in a decision that will be determinative of the law to be applied to the issues, both on the Application and the s. 4(1) *CPA* issues in the instant case. In other words, the next steps in the case - unless it is "paused" - will be determined on the basis of British Columbia law as it currently exists but such law will be confirmed, reversed or varied by the Supreme Court of Canada.

[38] The defendants point to a recent decision of Justice Masuhara where a “pause” was issued in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2011 BCSC 1128.

[39] That case was already certified and a trial date had been set. The concern was, as here, the uncertainty thrown up by *Sun-Rype* and *Microsoft* and the pending appeals to the Supreme Court of Canada. I note that Justice Masuhara did not “pause” the litigation. He, rather, slowed “steps in this litigation pending further development in the *Microsoft* and *Sun*-Rype cases.” (para. 16). This largely affected the document disclosure duties of the defendants, which represented the potential expenditure of very significant sums.

[40] The case at bar has not yet been certified. In this regard, it is on all fours with *Osmun et al. v. Cadbury Adams Canada Inc. et al.,* (Ont. S.C.J. File 08-CV-347263-PD2 (Scheduling Direction 20 September 2011). There, the defendants asked that the certification hearing be deferred pending the Supreme Court of Canada’s decisions on leave in *Sun-Rype* and *Microsoft*. Justice Strathy declined to do so. He concluded that (at para. 4):

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> Quite apart from the interests of the parties, the administration of justice is not served by further substantial delays in the class action that is already three years old and is nearly a year away from certification.

[41] He prefaced this decision by stating that (at para. 2):

> I accept the submissions of the defendants that if leave is granted, the decisions of the Supreme Court may have a significant impact on the availability of a cause of action for indirect purchasers. It may also have an impact on the evidentiary standard applicable to proof of loss or damage on a class-wide basis. I also accept that the defendants will suffer some prejudice, in the way of costs, if they were required to prepare for issues that are ultimately not relevant.

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[42] This case is not as old as *Osmun*, but like it, this case is based on an alleged conspiracy and the passage of time is a concern. Here, too, the certification proceeding is likely almost a year or more away. I, too, conclude that a delay at this time is neither in the interests of the parties as I have balanced them, nor in the interests of the administration of justice.

V

[43] In the result, I direct that the strike motion be heard at the same time as the plaintiff's application for certification, and that should be scheduled at this time. I imagine that a case planning conference will be required for that purpose and for the purpose of further refining the overall schedule of proceedings. I look to the parties to arrange that conference.

"R.J. Bauman C.J."

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The Honourable Chief Justice Bauman