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July 4, 2019

Class actions against investment advisors? Don’t bet on it

Class actions are common in the financial services sector. The relatively low bar for certification of such claims as class proceedings means that many such claims are certified. Yet certification is by no means automatic: where the litigation will not be significantly advanced through the resolution of common issues, courts will typically be reluctant to certify an action as a class proceeding.

Consistent with those general principles, plaintiffs have typically been relatively successful in certifying class proceedings against financial institutions where proceedings contain broad-based claims that an organization adopted an inappropriate policy that detrimentally affected class members in a uniform manner. By contrast, claims relating to negligent provision of individualized advice or services, such as negligence claims against investment brokers, will seldom be amenable to certification. The recent decision of the Alberta Court of Queen’s Bench in *Fisher v Richardson GMP Limited* shows the difficulty of certifying class actions against investment advisors, even when there is some element of commonality in the advisor’s alleged negligence.

By way of background, *Fisher v Richardson GMP Limited* was a proposed class proceeding brought by two sets of plaintiffs against Richardson GMP, Adam Woodward (a former investment advisor with Richardson GMP Limited), and Blair Pytak (the branch manager at the branch where Mr. Woodward worked).

The claim at its core was a negligence claim against Woodward. Woodward was an investment adviser who worked at the Richardson GMP branch in its Calgary office from November 2013 until December 2015. He provided financial and wealth management advisor services to 526 households, consisting of 724 individual clients.

After Woodward left Richardson GMP, the Investment Industry Regulatory Organization of Canada (“IIROC”) issued a Notice of Hearing to Woodward in November 2017. IIROC had received complaints from 58 individual clients, and it ultimately proceeded against Woodward on seven of those 58. An IIROC hearing was held, and Woodward did not contest the allegations. The IIROC hearing panel found that Woodward had

failed to use due diligence to learn essential facts about his clients in breach of his ‘KYC’ obligations, failed to provide suitable investment recommendations, and failed to ensure that these seven clients qualified for certain exemptions under securities law. The hearing panel also held that Woodward had applied a uniform investment strategy described as a “one size fits all strategy” to all seven clients without regard to any relevant factors.

The proposed representative plaintiffs then brought a proposed class proceeding against the defendants. The proposed consisted of all clients of Richardson GMP, excluding the named defendants, whose investments accounts were under the management and direction of Woodward during some or all of the period from July 30, 2012 up to and including May 20, 2016. The Statement of Claim advanced claims in negligence, breach of fiduciary duty, breach of contract, and vicarious liability.

Justice Campbell of the Alberta Court of Queen’s Bench ultimately dismissed the motion to certify the action as a class proceeding. While the Court held that the pleadings disclosed a cause of action and that there were 17 common issues, the Court held that there were two key impediments to certification of the action as a class proceeding. First, the court held that there was not an identifiable class of two or more persons within the meaning of s 5(1)(d) of the *Class Proceedings Act*. Second, the Court held that the class action was not a preferable procedure under s 5(1)(d) of the *Class Proceedings Act*.

With respect to the requirement that there be a viable class of two or more persons, the court held that the class definition was inappropriate. The court held that the high degree of variability among the members of the proposed class precluded the existence of a uniform identifiable class:

> [52] Different clients likely would have had differing risk tolerances, objectives, and time horizons depending on their personal circumstances and the composition of their investment portfolios. In addition, some clients may have purchased or sold securities based on information or advice received from sources other than Woodward and the WAM Advisors.

> [53] These facts are essential to the nature, scope, and extent of the duty each Defendant owed to members of the Proposed Class. The result is that the suitability claims are personal to each client and this factual matrix makes identification of the class complicated and problematic.

> [54] The Proposed Class is a highly variable group of individuals with different factual circumstances and backgrounds who may be owed different duties and who may have suffered different losses for different reasons. For example, the duty to advise, inform and warn that applies to an inexperienced investor is considerably higher than that applicable to a more sophisticated investor. Thus, the underlying facts for each of the Proposed Class will be critical.

> [55] In summary, the claims of the Proposed Class involve diverse experiences that cannot be meaningfully reconciled in a unifying class definition that would give rise to a common duty and standard of care. The Plaintiffs' Proposed Class definition fails to relate to a single, uniform experience. The mere fact that the proposed class definition identifies a group of individuals or involves the same defendant is not enough. The Action alleges many different causes of action that affect many clients in varying degrees and in substantively different ways. As such, the requisite duty and standard of care owed in the circumstances and any breach of that duty or contract cannot be resolved on a class basis.

The Court also held that the preferable procedure requirement was not met. The Court held that although the plaintiffs had identified a number of common issues, the common issues that would have been certified would not have meaningfully advanced the litigation. Rather, the most significant issues in the litigation were whether the defendants breached their respective duties to the plaintiffs, and whether damages were caused by the defendants' breach. The court held that these were individual issues that could not be resolved in a common issues trial. Central to the Court's conclusion on this was the notion that the content of the standard of care for an investment advisor was an individual issue that depend on the circumstances of the particular client:

> [74] The applicable standard of care, which determines the scope of a duty and the expected conduct flowing therefrom, would require individual determination and perhaps expert evidence. As such, a detailed fact-finding examination of each client's purchase of a security in the context of their individual circumstances and dealings with Woodward and the WAM Advisors would be necessary. The same holds true with respect to any duty to warn or inform, as the scope and content of such a duty is defined

with reference to the nature of the personal relationship between the investment advisor and client and to that client's personal circumstances.

[75] Numerous cases confirm that determining the appropriate standard of care in investment advice litigation depends on individual circumstances and requires a detailed examination of the relationship between the client and the investment advisor, the facts at the time the advice was given and the nature and type of investment product purchased or sold: *Young Estate v RBC Dominion Securities*, [2008] OJ No 5418 at para 182; *Transpacific Sales Ltd v Sprott Securities Ltd*, 2003 CanLII 27136 (ON CA), [2003] 67 OR (3d) 368 (CA) at para 33. The relationship between a broker and a client is on a spectrum that ranges from the broker acting as a mere agent or "order-taker" who simply executes the client's instructions to a full trust or fiduciary relationship in which the broker purchases and sells securities on behalf of the client in a discretionary account: *Junko v Canaccord Capital*, 2012 ONSC 6966 (CanLII) at para 50. This results in a spectrum of applicable duties, from relatively minimal obligations to execute orders and act honestly up to fiduciary obligations: *Vipond v AGF Private Investment Management*, 2012 ONSC 7068 (CanLII) at para 184. The standard of care applicable to an investment advisor-client relationship is a question of fact and the scope of the duties owed flows not from the relationship in the abstract, but from the facts of each individual case.

Interestingly, the Court held that a class action would not be the preferable procedure, despite having rejected the alternative resolution mechanisms that were suggested by the defendants. Specifically, the defendants argued that one or both of Richardson GMP's internal complaints process, as well as complaints to the Ombudsman Banking Services and Investments (OBSI) would be preferable procedures. While the court considered each of these processes, it rejected each of them as a preferable procedure.

With respect to Richardson GMP's complaint process, the Court held that while the system promoted judicial economy, it would not promote access to justice or behaviour modification. The Court noted that the complaint process provided limited procedural protection to investors who had suffered a loss. The Court further noted that there was no obligation to conclude that process through an offer of financial compensation. Finally,

Richardson GMP's complaint process did not encourage behaviour modification as it was meant to encourage private settlement.

With respect to OBSI, the Court held that OSBI had limited powers and financial jurisdiction with no ability to compel a brokerage to comply with its recommendations. In particular, OBSI's remedies were limited to naming and shaming, with no ability to provide restitution to affected individuals.

The certification decision in *Fisher v Richardson GMP Limited* is informative in a number of respects.

First, the Court's decision confirms that cases against investment advisors for the provision of allegedly negligent investment advice will generally not be amenable to certification as class proceedings. This is so even where, as here, the gravamen of the alleged wrong is that the investment advisor adopted a uniform investment strategy for all clients without consideration of their individual circumstances. While such a uniform approach by the advisor might appear at first glance to yield a common issue, the difficulty for plaintiffs in such cases is that they still require consideration as to the individual circumstances to decide whether that uniform approach fell below the standard of care in light of each particular client's circumstances.

Second, and more generally, the decision reaffirms the principle that claims involving professional advice and services that are intended to be tailored to particular clients will typically be difficult to certify. While in some cases, a particular style of advice may be clearly wrong in all circumstances, the suitability of the particular advice will generally depend upon the client being advised. Where the suitability of even uniform advice varies from individual to individual within the class, it will be difficult for plaintiffs to persuade courts to certify such actions as class proceedings.

Finally, this decision is a good reminder of the principle that in order to successfully oppose certification on preferable procedure grounds, the defendant need not show that there is another, better procedure for resolution of the common issues. Rather, if the resolution on the common issues will leave class members in essentially the same spot they were in before the resolution of the common issues, this is sufficient to find that a procedure is not a preferable procedure.