

CANADA / JUDGMENT

Makasoff v. CIBC World Markets Inc.

2017 BCSC 2128

COURT

Supreme Court of British Columbia

DECIDED

22 November 2017

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2017 BCSC 2128 Makasoff v. CIBC World Markets Inc. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Makasoff v. CIBC World Markets Inc., 2017 BCSC 2128 Date: 20171122 Docket: 18553 Registry: Nelson Between: Philip M. Makasoff and Sandra L. Makasoff Plaintiffs And CIBC World Markets Inc. doing business as CIBC Wood Gundy, Geraldine D. Mannings and Robert Trickey Defendants Before: The Honourable Mr. Justice McEwan Reasons for Judgment Counsel for the Plaintiffs: T. Pearkes Counsel for the Defendant Geraldine D. Mannings: S. Gudmundseth, Q.C. L. Kotler Counsel for the Defendant CIBC World Markets Inc. doing business as CIBC Wood Gundy and Robert Trickey: J. Heelan M. LaFleche Place and Date of Trial/Hearing: Nelson, B.C. October 10, 2017 Place and Date of Judgment: Nelson, B.C. November 22, 2017

- [1] The defendant Geraldine Mannings and the defendants CIBC Wood Gundy and Robert Trickey apply to have the jury notice in this matter struck.
- [2] The basis on which the defendant Geraldine Mannings applies is that: The trial cannot fairly be determined by a jury because, in the language of Rule 12- 6(5)(a):
- (i) the issues require prolonged examination of documents and accounts that cannot be made conveniently with a jury, (ii) the issues are of an intricate or complex character, and (iii) the extra time and cost involved in requiring that the trial be heard by the court with a jury would be disproportionate to the amount involved in the action.
- [3] The Notice of Civil Claim runs some 19 pages. It includes the following elements:
- a. An alleged contract between the Plaintiffs and Wood Gundy that - beyond the written account agreement (para. 34) - includes a number of implied terms (paras. 12(a)-(h));
 - b. Allegedly concurrent duties of care in tort owed by each Defendant (para. 13);
 - c. Alleged breaches of contract and duty of care in respect of trading activity between 2001 and 2013 across 9 investment accounts, of which each trade was alleged to be "solicited" (a term of art in the investment adviser industry) by Mrs. Mannings (paras. 12, 14, 16, 18-29);

- d. Multiple "Know your Client" forms alleged to be inaccurate with respect to the Plaintiffs' investment knowledge, investment objectives, and risk tolerances, each term being terms of art in the investment industry (paras. 17-18, 22-25, 28-30);
 - e. Allegations that the Plaintiffs did not have the opportunity to review and did not understand multiple documents that they voluntarily signed (para. 33);
 - f. Alleged unspecified acts of discretionary trading (paras. 37-38);
 - g. An alleged fiduciary relationship between the Plaintiffs and each Defendant (para. 40);
 - h. Alleged negligent misrepresentations made by Mrs. Mannings (paras. 46-50);
 - i. Alleged breaches of the standard of care, including largely unspecified alleged breaches of:
 - i. "High standards of ethics and conduct in the transaction of business with clients." (para. 51)
 - ii. "regulations by securities commissions"; (para. 51)
 - iii. "regulations by self-regulatory organizations" (para. 51);
 - iv. "CIBC Wood Gundy's Rules and Procedures" (paras. 54 and 57);
 - v. "Standards of the investment industry" (para. 54); and
 - vi. Other alleged elements of the standard of care listed at paragraph 56.
 - j. Reliance on the provisions of the Securities Act of British Columbia [sic], the Securities Rules of British Columbia and the Rules enacted by the Investment Industry Regulatory Organization of Canada (Part 3, para. 5); and,
 - k. Alleged failures by the Defendants Tricky and CIBC Wood Gundy to exercise the appropriate standards of supervision and oversight reasonably expected of a major investment advisory firm and its adviser, (para. 35).
- [4] The plaintiffs' claims are distinct but overlapping. They include claims for general damages, special damages and punitive damages.
- [5] These claims are all denied and defended on the following basis:
- a. No breaches of any applicable duties;
 - b. No fiduciary duty;
 - c. Ratification by the Plaintiffs of all of the impugned transactions;
 - d. Unjust and inequitable shift of market risk from the Plaintiffs, who are the investors and thereby properly bear the risk of their investments, to the Defendants; and
 - e. Expiry of the applicable limitation period.
- [6] The defendants deny any loss, particularly in relation to gains made in the investment portfolio over the years. They also plead contributory negligence. Liability assuming it is proved will need to be apportioned between each of the five parties to the lawsuit.
- [7] The issues set out in the pleadings appear to be intricate and complex.

- [8] The number of documents exceeds 3,000. There may be extensive reference to them on the issues of "suitability". There will have to be distinctions made between what is suitable and what is not and whether there was contributory negligence.
- [9] On the issue of damages the parties may have to address issues between the experts, which raise a number of distinct legal issues which may not be settled until the trial proceeds.
- [10] Plaintiffs are entitled to choose the mode of trial but it must be clear that the trial will be fair to all parties. *Lomax v. Weins*, 2003 BCSC 396
- [11] This case will probably require a prolonged examination of documents. It is not enough for a jury to be able to understand the evidence, which is difficult on its own, but the jury must be able to retain its understanding and then during a time constrained deliberation period analyze the evidence and decide the difficult questions in this case. The words of McEachern, C.J.S.C., in *Wipfli (Guardian ad litem of) v. Britten*, [1981] B.C.J. No. 1706 are applicable: This case cries out for unhurried and thoughtful consideration. There must be a weighing of alternatives, and an opportunity to reflect upon these alternatives. With deference, I also refer to what I said in *Henry v. Knickerbocker*, unreported, May 8, 1981 (Victoria Registry): A Judge deciding this case without a jury would, after hearing the evidence and reviewing his notes or a transcript, assess and consider all the evidence including the many medical reports and the submissions of counsel. He would probably draft and re-draft a judgment several times, and he would make countless calculations to test and verify the reasonableness of his conclusions. Like any conscientious jury, he would agonize over his conclusions, but he would do so at a leisurely pace and he would not be under pressure of time or the personal comfort of himself or others in making the kind of calculations which should be made to test the reasonableness of his conclusions. *Wipfli (Guardian ad litem of) v. Britten*, [1981] B.C.J. No. 1706
- [12] The complexity of the case may make charging the jury an all but impossible task, including because of the claim for punitive damages:
- [77] In a case like this it can be difficult enough for a judge sitting alone to properly instruct himself or herself as to the law applicable to the decision to be made. A judge sitting alone is able first to determine the real and necessary issues of fact and law applicable to the case. However, a judge sitting with a jury must charge the jury on one occasion on all of the law that may be applicable, depending upon what view of the numerous issues the jury may take. In this case, there is such a multiplicity of issues that the task of a judge in charging the jury would be all but impossible. In turn, the task of the jury would be overwhelming. Moreover, since the jury gives no reasons for its decision, no matter the result there is likely to be a difficult appeal. *Dopf v. Royal Bank of Canada*, 1998 CanLII 6494 (BC CA); *Skretting Canada Inc. v. Westaqua Commodity Group Ltd. et al.* 2010 BCSC 1614

- [13] The CIBC defendants adopt the submission of the other defendant, Ms. Mannings. In addition they suggest that the case falls within Rule 12-6(2) which requires that a matter be heard without a jury. Rule 12-6(2)(e) reads as follows:
- (2) A trial must be heard by the court without a jury if the trial relates to:
- (e) the execution of trusts
- [14] At paragraph 44 the plaintiffs seek exemplary damages arising from the alleged breach of a defendant's fiduciary obligations.
- [15] The plaintiffs submit that it is entitled to a jury trial. In *Cliff v. Dahl*, 2012 BCSC 276 the court said:
28. There is a presumptive right to a trial by jury and Mr. Cliff should not be deprived of that right unless there are cogent reasons to do so. The onus rests with the applicant to clearly satisfy this heavy burden. As Arnold-Bailey J. concluded in *Gulamani* at para. 43: In my view, the point to be drawn from *Reischer* is clear: juries in this province are held to be informed and intelligent and capable of assessing expert evidence where it is properly presented. In other words, the threshold for determining whether a prolonged examination of documents or a scientific investigation is necessary and whether it can be conveniently done by a jury (Rule 39(27)(a)(i)), or whether the issues are of a complex or intricate nature (Rule 39(27)(a)(ii)), is relatively high even in the context of a long trial with many difficult legal questions.
- [16] The mere existence in the pleadings of multiple claims and regulatory systems or that expert evidence will be tendered on multiple issues does not satisfy the requirement for the judicial excuse of the discretion to strike a jury notice. The facts must be found that the case is intricate and complex so as to make it inappropriate for a jury. Examples of complex pleadings, legal issues and assessments of damages where jury notices were not struck include *Renaerts v. Korn* CanLii 6437, leave to appeal dismissed 1998 CanLii 6644.
- [17] In *Andersen v. Porter*, 2000 BCSC 1000, R.D. Wilson observed:
14. Absent a universal referent for "intricate or complex", prior decisions have identified a constellation of factors, quantitative and qualitative, which may assume the character "intricate or complex". See *World Wide Treasure Adventures Ltd. v. Ralph*, [1995] B.C.J. No. 579. Examples of those factors include:
1. Multiplicity of parties: *Nikal (Guardian ad litem of) v. Caira*, [1993] B.C.J. No. 277; *Lew (Guardian ad litem of) v. Mount Saint Joseph Hospital Society*, [1995] B.C.J. No. 1974; *Maki (Guardian ad litem of) v. Abrahams*, [1996] B.C.J. No. 54.
 2. Duration of trial: *Wipfli (Guardian ad litem of) v. Britten*, [1981] B.C.J. No. 1706; *Scott v. Davies*; *Maki*.
 3. Volume of expert testimony: *Scott*; *Nikal*; *Maki*.

4. Multiplicity of standards of care: Nikal; Lew; Maki.
 5. The use of unfamiliar medical terms: Nikal.
 6. Apportionment of fault: Wipfli; Mighton v. Maile, [1986] B.C.J. No. 1340; Jennings Estate v. Gibson, [1992] B.C.J. No. 1822.
 7. The assessment of future loss: Wipfli; Maki.
 8. Novel applications of the law: Shobridge v. Thomas, [1999] B.C.J. No. 1747; Lew.
 9. Deliberation time: Wipfli; Scott; Nikal; Maki.
 10. Preservation of the civil jury system: Foote v. Royal Columbian Hospital, [1982] B.C.J. No. 456.
- [18] The fact that causes of action include breach of contract, breach of fiduciary duty and interference with economic relations or that the assessment of damages may involve a large number of transactions over many customer accounts are not grounds for striking a jury notice. The real question is what will the jury be asked to do and are those tasks too complex or intricate to ensure a fair trial.
- [19] Jurors are uniquely suited to participate with the jury in the establishment of appropriate standards for members of professional bodies *World Wide Treasure Adventures Ltd. v. Ralph* (1995), 5 BCLR (3d) 190 (S.C.) and *Esposito v. City of Abbotsford*, 2003 BCSC 1787.
- [20] The lawsuit does not raise the principal issue of the execution of trusts.
- [21] It is possible that this case may be brought in a manner that is not too complex for a jury. The odds are very much against it, however. I think the case fits within the rule set out in *Wipfli (Guardian ad litem of) v. Britten* and that the case is one where the jury will be left with a large number of considerations and a limited time to make the decisions it must make. The case of *Dopf v. Royal Bank of Canada* is a case in point, where the jury was left with an overwhelming difficulty as the Court of Appeal noted. The case of *Renaerts v. Korn* is on the flipside. There, the issue really came down to a matter of fact about what occurred in the hospital over a brief period of time and the rest of the "complexity" was really a matter of sifting the experts reports and coming up with a quantum analysis. It was not a complex case.
- [22] It is my view that this is a complex case. It may appear manageable to counsel for the plaintiff but it will be defended vigorously and I think it will be complex in ways that we do not envision. Though I am reluctant to take it away from a jury, I think it far more likely than not that it will be too complex for a jury to conveniently handle. The jury notice is struck and the case shall proceed before a judge alone. Costs will be in the cause. "McEwan J."

The Honourable Mr. Justice McEwan

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